



DEBT RECOVERY IN COMMERCIAL LEASE AGREEMENT: A STUDY OF  
COMMERCIAL RENT ARREARS RECOVERY (CRAR) IN UNITED KINGDOM

BY

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AN INDEPENDENT STUDY PAPER SUBMITTED IN PARTIAL FULFILMENT OF  
THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS  
(INTERNATIONAL PROGRAM)

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ASSUMPTION UNIVERSITY

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Independent Study Title : Debt Recovery in Commercial Lease Agreement: A Study of Commercial Rent Arrears Recovery (CRAR) in United Kingdom

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Major : Master of Laws (International Program)

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## ABSTRACT

The study aims to examine Principle of Commercial Rent Arrears Recovery (CRAR) under the Lease of Immovable Property for Commercial or Industrial Purposes Act of 1999 and under the English law. The study follows qualitative method.

The study indicates that The Act of 1999 does not adopts CRAR and causes the problems of debt recovery for landlords. The study also indicates that English law implements the CRAR effectively. In addition the English law provides a variety of measures for taking control of tenant's goods in order to make it easier, quicker and more efficient to induce the tenant to pay an outstanding debt without the need to proceed to the next step of auctioning the goods off or going through further court-related procedures; thus, CRAR implementation is available to reduce debt recovery problems.

The study recommends that Thailand should add the Principle of Commercial Rent Arrears Recovery (CRAR) into the Lease of Immovable Property for Commercial or Industrial Purposes Act of 1999.

## ACKNOWLEDGEMENTS

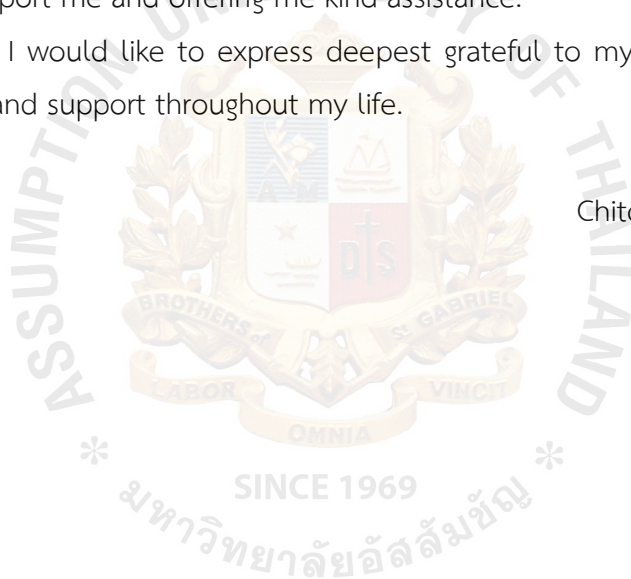
I would like to express my appreciation to those who have supported me, either directly or indirectly, in my Independent Study paper.

I am grateful to all of the professors who taught me throughout the academic year 2019-2021. I would like to appreciate Asst.Prof.Dr.Sthianrapab Naluang, my research adviser, Asst. Prof. Dr. Nattapat Limsiritong, for your valuable suggestions, expertise, inspiration given to me from the start until the completion of this Independent Study paper.

My special thanks and appreciation go to all my friends, classmate who constantly support me and offering me kind assistance.

Finally, I would like to express deepest grateful to my beloved families who have natured and support throughout my life.

Chitchanok Maneewan





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# Chapter 1

## Introduction

### 1.1 Background and General Statement of the Problems

A commercial lease agreement is a tenancy arrangement between a landlord and a business tenant for the purpose of operating a business or providing a service within the leased premises in order to earn profits.

Foreign investment in Thailand contributes significantly to the growth of the industry and the national economy by generating income and employment, as well as indirectly producing positive outcomes through the transfer of knowledge and manufacturing technology.

To boost economic growth by encouraging foreign investment, Thailand has enacted a law, the Lease of Immovable Property for Commercial or Industrial Purposes Act of 1999 (1999 Act), to allow and govern long-term property leases for commercial and industrial purposes.

It is difficult to deny that local property investors play an important role in encouraging participation in commercial leases under the 1999 Act and promoting foreign investment in Thailand. In order for the Thai property market to be able to supply adequate business premises for foreign investors to invest in, a local developers must first decide to invest in real estate with the intention of providing a business premises.

When engaging into a commercial lease agreement, however, there is a possibility of getting into difficulty with a default tenant and having problems recovering debt related to the lease agreement. Unfortunately, the Lease of Immovable Property for Commercial or Industrial Purposes Act of 1999 does not provide a specific debt collection method for leases covered by the Act.

Consequently, in order for the landlord to collect any debt arising from the commercial lease, the landlord need to recover it through court proceeding as prescribed by the Civil and Commercial Code. Furthermore, if a landlord obtains a judgment against a default tenant and the tenant fails to comply with the judgment, the landlord must initiate the execution procedure for enforcing a judgment as specified by the Civil Procedure Code.

Nevertheless, due to the court's workload, debt collection through court procedures is relatively time consuming and costly. According to Court of First Instance statistics<sup>1</sup>, there are presently a large number of civil cases pending before the court, resulting in a lengthy wait for the court to hear them. The entire caseload is 115,528 cases, however only 32,162 of them can be disposed of, yielding a case disposal rate of 27.83 percent.

Based on this information, it is possible to conclude that the court system is overburdened, which is one of the factors contributing to the lengthy time required to recover debt. As a result, recouping debt through the court system is insufficient and ineffectual in settling debt in timely manner, contributing to the failure to encourage local developers to invest in real estate in order to provide business premises for foreign investors and participate into commercial lease agreements under the Lease of Immovable Property for Commercial or Industrial Purposes Act of 1999.

A lack of local real estate investment to supply business premises for foreign investors would result in a slowing of the property market and a shortage of business premises. Because there are fewer eligible leased premises for foreign investment, there will be a demand-supply imbalance for leased premises, resulting in a rent increase. The rise in the rent of eligible leased premises for foreign investment will undoubtedly have a negative impact on foreign investors' decision to invest in Thailand, perhaps causing a slowdown in the economy.

For many centuries, English law has provided a summary remedy known as the Distress remedy for recovering rent arrears for landlords. This remedy allows commercial landlords to collect rent arrears in commercial lease agreements without the need for judicial action by seizing goods from the leased premises and auctioning them off, allowing the landlord to recover rent arrears in a timely manner.

However, in 1991, the UK Law Commission recommends that the Distress remedy should be abolished<sup>2</sup> due to claims that it involves a significant interference

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<sup>1</sup> Office of planning and budget, "Statistics of pending cases, new receipts, disposal and pending cases of courts across the kingdom of Thailand for the year 2021 (January - April)," [www.oppb.coj.go.th](http://www.oppb.coj.go.th), (accessed June 20, 2021).

<sup>2</sup> The Law Commission of England and Wales, "Landlord and Tenant Distress for Rent," 4 February 1991, p.30.

with human rights, particularly in terms of a tenant's right to privacy and his house, as well as the right to peaceful enjoyment of his possession.<sup>3</sup>

Nevertheless, in order to avoid a slowing of the property market and a shortage of business premises, which would have unacceptably negative consequences for the economy and employment if the Distress remedy, which is the landlord's preferred method of recovering rent arrears due to its speed<sup>4</sup>, was completely abolished with no replacement procedure, as well as to respond to court complaints about the cost, delay, ineffectiveness, and complexity of court trials<sup>5</sup>, rather than completely eliminating the Distress remedy, the Tribunal, Court, and Enforcement Act 2007 abolished it and replaced it with a modified framework known as Commercial Rent Arrears Recovery (CRAR).

The Commercial Rent Arrears Recovery (CRAR) is allowed under the Tribunal, Courts, and Enforcement Act 2007, chapter 2, section 72. The CRAR permits the landlord to instruct a Certificated enforcement agent to utilize the taking control of goods procedure to seize the tenant's goods and sell them at public auction to collect outstanding rent without the requirement for a court order. Therefore, this measure takes a short period of time to recover rental arrears when compared to the court approach.

Furthermore, because of the various methods for taking control of goods, which usually offer in a compromise manner, such as entering into controlled goods agreement, it not only saving the landlord from litigation cost and enable the landlord recover rent arrears in a timely manner, but it also allows tenants who have financial difficulties or poor trading conditions to be able to manage his financial planning and continue operating his business in leased premises without incurring legal fees or wasting time attending court trials.

In Thailand, like in the United Kingdom, a slowing property market and a lack of business premises would have had an unacceptable negative impact on the Thai economy and employment.

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<sup>3</sup> Fuller V Happy Shopper Market Ltd. (England and Wales High Court, 2001).

<sup>4</sup> Finn, The Law Commission Working Paper No.97 Distress for rent (London: Her Majesty's Stationery office, 1988), p.83.

<sup>5</sup> The Law Commission of England and Wales, op.cit, p.23.

To alleviate the problem caused by the lack of a specific debt collection mechanism under the 1999 Act, and encourage more local developers to invest in real estate in order to supply sufficient leased premises to foreign investors and participate in commercial lease agreements under the 1999 Act, thereby encouraging foreign investment and strengthening the Thai economy, as well as for academic purposes and the further development of the Thai legal system, the researcher is interested in studying and analyzing the Commercial Rent Arrears Recovery (CRAR), along with analyzing the feasibility of implementing the CRAR as a debt collection method for registered leases under the Lease of Immovable Property for Commercial or Industrial Purposes Act of 1999, in three aspects: its fundamental requirements, procedure, and applicable person for using it.

## **1.2 Hypothesis of the study**

The Lease of Immovable Property for Commercial or Industrial Purpose Act of 1999 does not provide a particular debt collection mechanism for commercial leases. It causes the problems of debt recovery in commercial leases under the Act. To resolve the problems, Thailand should revise the Act by adding the principle of Commercial Rent Arrears Recovery (CRAR) into the Act.

## **1.3 Objectives of the Study**

1.3.1 To study the historical background and general concept of Commercial Rent Arrears Recovery (CRAR).

1.3.2 To study the basic requirements, process, and qualified authority for using the Commercial Rent Arrears Recovery (CRAR), as well as the debt recovery procedure under the Lease of Immovable Property for Commercial or Industrial Purposes Act of 1999.

1.3.3 To evaluate the effectiveness of the Commercial Rent Arrears Recovery (CRAR).

1.3.4 To analyze the possibility of adopting the Commercial Rent Arrears Recovery (CRAR) into Thai legislation.

## 1.4 Scope of the Study

The study will examine the obstacles and problems that come with implementing Commercial Rent Arrears Recovery (CRAR) in Thai law, particularly the Lease of Immovable Property for Commercial or Industrial Purposes Act of 1999. Furthermore, the study will evaluate the effectiveness of the Commercial Rent Arrears Recovery (CRAR).

Due to the COVID-19 pandemic, the researcher recognizes some temporary restrictions on the use of commercial rent arrears recovery (CRAR) by raising the minimum net unpaid rent that must be outstanding before it may be utilized. CRAR could be used with 7 days or more of rent outstanding prior to the restrictions; however, the Taking Control of Goods (Amendment) (Coronavirus) Regulations 2020 raise the minimum net unpaid outstanding rent to 554 days and extended the timeframe until March 25, 2022.

Due to a time limitation, this study will primarily focus on the utilization of Commercial Rent Arrears Recovery (CRAR) in a normal situation prior to the COVID-19 outbreak.

## 1.5 Study Methodology

This study utilizes documentary methodologies, such as a review of Thai and English legislation pertaining to Commercial Rent Arrears Recovery (CRAR), as well as a reference to the Tribunal, Court, and Enforcement Act 2007 and associated regulations. Furthermore, this study drew on information from books, papers, published theses, and online sources related to the aforementioned document, both in Thai and English. Lastly, the researcher evaluates the problem in order to reach a conclusion and make recommendations for how to implement the CRAR procedure in Thai law.

## 1.6 Expectation of the Study

1.6.1 To understand of historical background as well as the general concept of Commercial Rent Arrears Recovery (CRAR).

1.6.2 To understand problem of debt recovery under the Lease of Immovable Property for Commercial or Industrial Purposes Act of 1999.

1.6.3 To comprehend the efficacy of the Commercial Rent Arrears Recovery (CRAR).

1.6.4 To obtain suggestions for revising the Lease of Immovable Property for Commercial or Industrial Purposes Act of 1999.





## Chapter 2

### Historical Background and General Concept of the Commercial Rent Arrears Recovery

#### 2.1 Definition, Origin and Progression of the Law on Distress

One of the approaches a landlord can recover rent arrears is by Distress for rent. Distress for rent is an ancient summary remedy that allows landlords to recover rent arrears, which is monetary debt, without going to court by seizing and selling property from the rented premises. At an early time, this remedy gives the landlord the right to enter the rented premises and seize and retain goods found there, regardless of who owns them, as soon as the rent is overdue. Afterward, the landlord has had the right, given by a statute, to sell the goods in order to cover the rent owed. Since distress is an automatic right arising from the duty to pay rent, it is always available to the landlord of premises when rent is in arrears.

Distress remedy has been widely used in Commonwealth countries, and it can be used in both residential and business tenancies. Currently, some countries have fully abolished the distress remedy; however, some countries, such as the South Northern Territory, the Australian Capital Territory, and British Columbia, have restricted the distress remedy to commercial tenancies only.

In the United Kingdom, since Tribunal, Courts and Enforcement Act 2007 come into force, a landlord's right of distress against his tenant to reclaim rent arrears has been repealed, and a new statutory regime for Commercial Rent Arrears Recovery has replaced it (CRAR). The CRAR procedure is similar to the previous distress scheme in that it does not require the involvement of the courts; all that is required is an instruction from the landlord to the Certificated enforcement agents to recover the rent or seize the property. However, once any determined grounds are met, the courts will be able to intervene at any time during the procedure, if applicable

##### 2.1.1 Definition of Distress in General

In general, a Distress is a remedy for the redress of an injury, the performance of a duty, or the satisfaction of a demand; it consists in the taking, generally without legal process, of a personal assets from the wrongdoer or defaulter's possession

into the hands of the injured party, to be kept as an insure for the redress, performance, or satisfaction of the demand. The distress remedy tends to be the most effective and also the oldest remedy for recovering rent as a debt due to its nature.<sup>6</sup> Moreover, this remedy seems to be so ancient in English law that it is most likely coeval with the common law itself; or, to put it simply, it can be considered as one of the principles that constitute the basis of the common law<sup>7</sup>

This remedy gets its name from the Saxon word "Namium", and later under the name of Distress, which came from Norman French of a later age. The act of taking, the thing taken, and the remedy in general are all referred to as a distress by an uncertain use of the word.<sup>8</sup>

### 2.1.2 Origin and Progression of the Law of Distress

The origins of the distress doctrine's antiquity are unclear, since it's difficult to trace the rise and spread of those customs that arose among a savage and uneducated people who entrusted the preservation of their laws to a vague and uncertain tradition<sup>9</sup>. Even the ancient commentator deny knowing where it originated from: "From whence soever the name or the notion came, the remedy obtained so early in our law, that we have no memorial of its origin with us".<sup>10</sup>

However, it seems that the remedy for distress was brought into English law prior to the time when England was ruled by a feudal system.<sup>11</sup> As mentioned in previous part, after the feudal system was established, all lands belonged to the monarch. The lord is responsible for providing soldiers to defend the king at that time. The king would give the lords land in return for their military service and political

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<sup>6</sup> S.B. Harrison, Esq., A practical treatise on the law of landlord and tenant (London: Henry Sweet, 1856), p.347.

<sup>7</sup> James Bradby, A treatise on the law of Distress (London: Joseph Butterworth and Sons, 1828), p.1.

<sup>8</sup> Edward Bullen, A practical treatise on the law of Distress, &c. (London: Shaw & Sons, 1842), p.3.

<sup>9</sup> James Bradby, op.cit., p.1.

<sup>10</sup> Gilbert, The law and Practice of Distress and Replevin, 2<sup>nd</sup> ed. (London: His Majesty's Law-Printers, 1794), p.2.

<sup>11</sup> James Bradby, op.cit, p.1.

partnership. The lord splits the land into smaller pieces and gives them to the soldiers as a knight fee in exchange for the soldier's loyalty and support. The lords also give plots of land to peasants who work for them, allowing them to live and work on the land and provide labor services for the lord, such as providing crops or cattle. At that time, it is possible to consider the lord's soldiers and peasants to be the tenants.<sup>12</sup>

The non-performance of the feudal services that the tenant owed to his lord seems to have been one of the most ancient reasons for which Distresses were normally rendered in England. As mentioned earlier, in the early stages of the feudal era, these services mostly consisted of military duties and labor services, which had an ambiguous scope. Because of the unclear scope of those services, determining the amount of the lord's damages caused by non-performance of the service was difficult; as a result, Distress seemed to be an unsuitable remedy to apply in such case. As aforementioned, the lord gave land to the knights in exchange for their military service. In exchange, the knights owed the lord military duty. By paying scutage, the knights were able to "buy out" of military service. With the passing of time, kings started to levy a scutage on anyone who held the land given by the lord, whether or not they were a knight.<sup>13</sup> After the service of the military was converted into a monetary sum known as scutage, which can be referred to as rent in the present, Distress became the standard method of recovering that sum of money. Subsequently, when a tenant defaulted, the lord took possession of the land and held it until he was satisfied for his damages.<sup>14</sup>

Later on, the Distress remedy was also extended to apply in the labor service under the feudal contract as well. However, these measures were found to be too harsh, and the tenant was unable to make the satisfaction due to his inability to pay his service rent as a result of being deprived of his land possession or the other word forfeiture of the land; hence, the seizure of the cattle and other moveable property, such as the produce of farm, found on the land, and the holding as a pledge was replaced, or in other words, the replacement measure was a result of adjusting the

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<sup>12</sup> Neeyada Sirisampandh, "Problem on consumer protection law: study on residential lease agreement," (Master of Law Thesis in Business law, Faculty of law Assumption university, 2009), pp.9-11.

<sup>13</sup> Wikipedia, "Scutage," [www.wikipedia.org](http://www.wikipedia.org), (accessed May 15, 2021).

<sup>14</sup> James Bradby, op.cit, p.4.

existing law of distress to the required purpose.<sup>15</sup> As a result, the lord was now able to seize and detain the pledge assets in order to compel the performance of the feudal contract's services.

It should be noted that the function of distress was initially seen as a means of obtaining a remedy rather than a remedy itself: for once made, the tenant's assets remained only as an assurance in the hands of the distrainer (lords) until the payment was made or the service has been completed, and they could not be sold. As a result, although a Distress inconvenienced the tenant and was thereby a punishment to him, it was no remedy at all to the distrainer if the tenant continued to be obstinate and did not fulfill the distrainer's satisfaction.<sup>16</sup>

Due to the lack of rule govern on this issue, during the civil war, a Distress was turned into a weapon of private vengeance and public abuse by the lords. Aside from seizing the assets of the tenants, the physical violence was also committed and claimed as part of the Distress procedure. A Distress became a tool of great oppression and was as traumatic to the tenant as forfeiture of land itself. This power, as exercised by the lords, not only oppressed the tenants, but also placed them completely under the control of the Lords<sup>17</sup>. Nonetheless, at the end of Henry III's reign, a specific law was passed to govern the manner of Distraining and to prohibit the lords from using it for purposes other than those for which it was first introduced.<sup>18</sup> From this point forward, the law of distress, which appears only in practice, will be defined in common law provisions, confirming its existence.

The Magana Charta and the statute De Districione Scaccarii and statue of Marlebridge are the example of the laws that support the provision of Distress. In the reign of William and Mary, the scope for applying the Distress also has been restricted, with the scope limited to rent-related issues and granting the landlord the distress right as legal remedy for the recovery of his rent. The remedy of distress, on the other hand, is ineffective for the recovery of rent because the nature of distress, as specified by common law, does not grant the distrainor the power to sell the tenant's seizure assets

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<sup>15</sup> James Bradby , Ibid, p.4.

<sup>16</sup> S.B. Harrison, Esq., op.cit., p.311.

<sup>17</sup> "The Law of Distress," Law Magazine and Law Review; or, Quarterly Journal of Jurisprudence 31,2 (1871): 298-310.

<sup>18</sup> James Bradby, op.cit., p.5.

held in the distrainor possession. As a result, if the tenant continued to be obstinate and refused to pay, the distrainor had no redress. To address this issue, the statute 2 Wm. & M.c.5, states that in all cases of rent distress, upon any demise, lease, or contract, if the rent is not recovered within five days after the notice given to the tenant of the cause of distress, the distrainor, with the sheriff, has the authority to sell the tenant's seizure properties in order to recover rent.<sup>19</sup>

In addition, the statute 8 Anne, c. 14, allow individuals with rent in arrears for any lease for life, years, or at will to distrain for such arrears within six months after the termination of the contract, whether rendered within the landlord's title and the tenant's possession; which initially, common law does not grant this privilege. Moreover, In the event that the tenant removes assets from the rental premises in order to avoid distress, the same statute provides a provision for the avoidance of this matter by allow the landlord to follow and distrain the goods within five days after such removal. This rule, however, has been expanded and made more effective by statute 11 Geo. 2. c. 19, which states that the landlord can pursue and distrain the goods anywhere they may be found within thirty days of their removal.<sup>20</sup>

These are the major provisions that the legislature has deemed necessary to enact in order to improve the remedy of distress for the recovery of rent. And by these means, a distress that was once a very hazardous, and in others, a very ineffective procedure, has been transformed into one of the most equitable and effective remedies available under English law.

Distress has fallen out of favor during the twentieth century. However, in the latter half of the twentieth century, the practice regained popularity among landlords, leading a Law Commission Report (1991) Law Com No 194 suggesting that distress was a thoroughly bad thing, and proposing its complete abolition. The Law Commission's suggestions, which were followed up by a Government review of distress in 1998, took more than 20 years to be enacted in the form of the Tribunals Courts and Enforcement Act 2007 (2007 Act). Despite the fact that the new statute repeals the

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<sup>19</sup> James Bradby, *Ibid.*, pp.6-9.

<sup>20</sup> *Ibid.*, pp.10-11.

distress remedy, it maintains nominal and exclusive powers to seize and sell goods and renames it "Commercial rent arrears recovery" or "CRAR".<sup>21</sup>

## 2.2 Derivation of Distraint Power

The power of distraining is distinguished as being held either of common right, or by special power.

### 1. By a Common Right

This concept is based on the reversionary interest created by the property law. Reversionary interest refers to a property owner's (reversioner) future interest in the property that he holds by giving another person an incomplete interest in the property. A reversionary interest is most commonly created in the context of a property lease. In the situation where the lease ends, the original owner's interest in possession of the property and all right of the property will be returned to him.<sup>22</sup>

According to the terms of the lease, the lessee is granted a number of rights to the property, including, at a minimum, the right of possession for the duration of the lease. The lessee does not have complete ownership of the premises. In fact, the terms of a lease agreement revert all rights to the original owner upon the lease's expiration.<sup>23</sup>

By offering the lessee an incomplete interest in the property, the rent can be called a future interest in the property that the lessor holds. The rent as a future interest must return to the lessor as the original owner of the property when the lease expires. As a result, the law, without any express provision, gives the lessor this remedy for such rent.<sup>24</sup>

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<sup>21</sup> Caroline Shea, "The abolition of Distress and new statutory regime of CRAR, [www.falcon-chambers.com](http://www.falcon-chambers.com), (accessed May 21, 2021).

<sup>22</sup> Attorney Thoughts, "What is Reversionary Interest?," [www.youtu.be](http://www.youtu.be), (accessed May 17, 2022).

<sup>23</sup> Ibid.

<sup>24</sup> S.B. Harrison, Esq., op.cit., p.348.



## 2. By Special Power

As an example, where one, not being the reversioner and therefore unable to distrain of common right, may reserve to himself the power of distraining when granting a lease by an express stipulation.

To conclude, distraint power may be derived from either a common right or a special power. Regardless of how the power of distress is obtained, the essence of it is the same, notably, to make all belongings found on the property, with certain exceptions to be stated later, liable to be taken into the custody of the injured person without legal procedure, and to remain in his hands as pledges to enforce the performance. Later, as a result of legislative enactments, these pledges were considered liable to be sold in the event of a distress for rent.

### 2.3 Key Elements of the Distress Law

When defining the remedy of distress, the five primary factors must be considered:

1. What can be considered "distrainable rent"
2. The procedure of imposition of distress
3. The goods that could be taken
4. The obligations of the landlord in relation to the selling of the goods
5. The available remedies for the landlord, the tenant, and a third party

#### 1. Distrainable Rent

Distress can only be used to enforce the obligation to pay rent under a lease or tenancy arrangement. The rent obligation was regarded an obligation to perform services, such as knight service or agricultural service, rather than paying money in the first time the remedy was used during federal reign. However, for decades, the rent obligation has been converted into a monetary obligation rather than a service obligation.<sup>25</sup>

Determining the amount payable to the landlord that could be identified as rent and hence be distrained was relatively simple at that time. According to the

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<sup>25</sup> S.Finn, The Law Commission Working Paper No.97 Distress for rent (London: Her Majesty's Stationery office, 1988), p.19.

case of *T. & E. Homes Ltd. v. Robinson* [1979], the court held that a rent is a certain amount of money that the landlord considers an exchange for the use of his property, and that the tenant is obligated to pay the sum of money to the landlord in exchange for the use of his property. As a result, in different contexts, the word "rent" can mean different things; however, the entire payment specified as rent in the lease may be recovered by a distress remedy. Therefore, payments such as service charges and insurance premium are often described as rent in leases, or they are treated as rent or recoverable as rent.<sup>26</sup>

## 2. Procedure of Imposition of Distress

If the landlord is unable to levy the distress himself, he could hire a certified bailiff to do so. A company landlord must hire a certified bailiff to levy the distress, as required by law.<sup>27</sup> When the bailiff issues the distress, he is required to follow additional rules, which include notifying the tenant of the distress.<sup>28</sup>

There are situations where the court's prior permission is required, regardless of who is prosecuting for distress. When a court order is required, the person who imposes the distress must apply for leave. The application for leave not only gives the tenant advance notice of the upcoming distress, but it also gives them the chance to avoid it. Leave is required where:<sup>29</sup>

- (a) The tenant is a firm that has been ordered by the court to be wound up;
- (b) The tenant has been called up or volunteered for military service;
- (c) The premises are leased under a secured tenancy under the Rent Act 1977, or a secured tenancy under the Housing Act 1988, Part I.
- (d) The premises are protected lease under the Rent (Agriculture) Act 1976.

Distress levy is not permitted on Sundays and must occur between sunrise and sunset. Entry, seizure, and impoundment are the three legitimate steps of the levy. Forceful entry into the demised premises is prohibited, but the laws governing what constitutes forcible entry remain unclear. It's difficult to tell the difference between a

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<sup>26</sup> S.Finn, *Ibid.*, pp.20-21.

<sup>27</sup> *Ibid*, pp14-16.

<sup>28</sup> *Ibid*, p.31.

<sup>29</sup> *Ibid*, pp.31-33.

seizure and an impoundment. Seizure appears to be the method of determining the goods to be confiscated, while impoundment appears to be the process of moving the goods into the landlord's custody, either remains in or out of the property where they are seized. When goods are impounded they are considered to be in the possession of the law. Walking possession agreements keep the goods in the tenant's physical possession while giving the landlord legitimate possession in exchange for the tenant's promise not to disturb or dispose of them. It's unclear if they function as kind of a impoundment.<sup>30</sup>

### **3. The Goods that could be Taken**

In general, under common law, all goods found on the premises for which rent is due are subject to seizure by the distraining landlord. As a consequence, even if the distrainer is aware that the goods do not belong to the tenant, he still can levy on them. However, there are several exemptions to this rule. Some goods are completely impervious to distress, meaning they cannot be taken under certain conditions. Others have qualified privilege, which means they cannot be taken where there are enough unprivileged goods on the premises. The list of goods that are eligible for different privileges is extensive, and it can be difficult for the landlord or bailiff to decide whether a specific good is eligible.<sup>31</sup>

### **4. The Obligations of the Landlord in Relation to the Selling of the Goods**

Within five days from the time of impoundment, the landlord will usually be able to auction the goods. He has a responsibility to get them the highest net price possible. He could use the proceeds of sale to recoup arrears that had accumulated at the time of the distress levy, but he must return any surplus to the tenant, although the further arrears have accrued<sup>32</sup>. The buyer of the goods from the landlord will receive good title to them if the distress is not illegal. Assessing whether or not a distress is "illegal, unusual, or inappropriate" can be difficult. An unlawful distress is one that is unlawful from the beginning, such as where a landlord distrain a tenant when there are no rent arrears. It's unusual when the seizing was lawful but the distress was handled

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<sup>30</sup> S.Finn, Ibid, pp.56-57.

<sup>31</sup> Ibid., pp.34-51.

<sup>32</sup> Ibid, pp.61-64.

incorrectly instead. When the valuation of the goods taken is clearly disproportionate to the unpaid rent, this is known as unreasonable distress.<sup>33</sup>

## 5. The Available Remedies for the Landlord, the Tenant, and a Third Party

### 1) The landlord remedy

The landlord's remedies are intended to secure his right to distrain by enforcing fines on the tenant who illegally removes his goods to avoid distress or who retakes them after they have been seized. When a tenant defrauds and secretly moves his goods from a rented demise to prevent being distrained, the landlord has the right to follow the goods and seize them at their new location within thirty days. He has the ability to force his entry into the premises and he'll be able to claim twice the value of the goods from the tenant and anyone who willingly assisted him.

The landlord can either regain the goods or claim triple damages from the offender when the torts of 'rescous' or 'poundbreach' are committed. When the distress was not illegal, retaking goods prior to impoundment is known as rescous. The act of taking back the goods after they have been impounded is called Poundbreach. The landlords used to place goods in a pound on a regular basis, and as the name implies, poundbreach was done if the pound was destroyed. Poundbreach is a tort in which the retaking of goods after impoundment is viewed as releasing them from the custody of the law. The punishment is a fine and imprisonment.

However, the remedy of Distress can affect the other remedies available to a landlord when rent is overdue. For example, Distress can prevent forfeiture for non-payment of rent because the Distress remedy is only available while the lease is still in force, the right of forfeiture is waived.

### 2) The Tenant Remedy

The tenant's options for redress differ depending on the extent of the misconduct. When the distress is unlawful, the tenant has a number of options. Before the goods are impounded, the tenant may reclaim them without having to go to court. If the items aren't sold, he has the option to "replevy." Replevin is divided into two parts. First, a request is made to the county court for an order for the return of the goods, which is normally issued in exchange for the tenant providing security for the

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<sup>33</sup> S.Finn, Ibid, pp.69-70.

unpaid rent and expenses, as well as a guarantee to pursue a replevin action as soon as possible. Second, the tenant files a lawsuit to argue the legality of the distress, and if he wins, he retains the goods and is entitled to damages and costs.

For the tort of unlawful interfering with his goods, the tenant may seek damages or, if applicable, an order for delivery of the goods. If the goods have been sold and there are no rent arrears, the amount of damages awarded is twice the worth of the goods. It's also possible to get an injunction to prevent a sale based on an unlawful distress.

Where the distress is unusual or inappropriate, the tenant's options are reduced to a claim for damages and possibly an order to prevent the goods from being sold.

### 3) The Third Party Remedy

By claiming privilege and serving the declaration and inventory stated in the Law of Distress Amendment Act 1908, a third party could be able to prevent the landlord from distraining his goods. If the distrainor gets these documents but nevertheless distrains, the distress would be illegitimate, and the third party will be entitled to request an injunction to have the goods returned to him.

## 2.4 The New Statutory Regime for Recovery of Rent Arrears: Commercial Rent Arrears Recovery (CRAR)

The Law Commission's position on distress was clear and unambiguous as stated in Law Commission report no.194, "It was wrong in theory because it provides an extra-judicial debt enforcement remedy in cases that are disproportionate to debtors, all creditors, and third parties due to its fundamental nature, the manner in which it arises, and the manner in which it is exercised<sup>34</sup>."

According to the Law Commission report, there were four distinct characteristics of distress to which a specific concern was raised. To begin with, the levying of distress gives landlords priority over all creditors. When a tenant owes both rent and other debts, distress allows the landlord to receive payment prior of other creditors by distraining the tenant while other creditors wait for court decisions on their debts.<sup>35</sup>

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<sup>34</sup> The Law Commission of England and Wales, op.cit., p.10.

<sup>35</sup> Ibid., pp.10-11.

Second, the remedy's availability makes third-party goods insecure because the remedy permit the third party goods to be taken. Moreover, Due to the fact that there is no requirement to notify him of the distress, the owner will be unable to protect them from seizure and selling in practice.<sup>36</sup>

Third, distress leads to harshness because the distress can be completed within seven days of the landlord's decision to distrain; thus, the tenant's right to challenge the landlord's claim is severely limited<sup>37</sup>. Moreover, the lack of means for regulating landlord's distraint behavior and the lack of means for controlling bailiff's distraint behavior also lead to the harshness<sup>38</sup>. Furthermore, the landlord has a right of peaceful access, but the scope and basis of this right are unclear. Despite the fact that forcible entrants are not allowed, they do exist<sup>39</sup>. In addition, the risk of selling goods at a low price. Although the landlord fulfills his obligation to sell at the highest possible price, the sum received is frequently considerably less than the goods' value to the tenant. The removal of the goods, on the other hand, could result in or lead to the tenant's insolvency because those goods may be critical to the tenant's business and the privileged classes of goods may not go far enough to secure them.<sup>40</sup>

Fourth, except in situations where tenants are simply using the landlord as a convenient source of financing, it is generally recognized in today's culture that a debt enforcement mechanism that exposes the debtor to intimidation, terror, shock, and embarrassment is not socially appropriate. Distress can be imposed regardless of a tenant's circumstance, such as their financial situation, demonstrating the lack of understanding of a modern approach to debt collection.<sup>41</sup>

Due to the four characteristics of distress described above, the Law Commission recommends that the distress remedy should be abolished. According to the fact that the law commission has been gathered, abolition of distress remedy has been either implemented or considered in the common law world, and where the remedy is still available, its use is either limited or rare. For example, in Northern Ireland, four

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<sup>36</sup> The Law Commission of England and Wales, op.cit., p.11.

<sup>37</sup> Ibid., p.12.

<sup>38</sup> Ibid., p.12.

<sup>39</sup> Ibid., p.12.

<sup>40</sup> Ibid., p.13.

<sup>41</sup> Ibid., pp.13-14.



Australian jurisdictions, and a few American states, rent distress has been completely eliminated. It has also been repealed in other countries, but only in regard to residential tenancies. The South Northern Territory, the Australian Capital Territory, and British Columbia, for example, have all limited distress to commercial tenancies.<sup>42</sup>

Regarding the probability of restricting distress to only commercial tenancies. According to the law commission's consultation paper, because of the effectiveness of the distress remedy, many respondent viewed that the distress remedy should still be available for commercial tenancies. The efficacy of distress was not questioned, implying that not only is distress extremely effective, but that in the vast majority of cases, the threat of distress may be sufficient to persuade a tenant to pay rent, without the landlord needing to commit to distress levy.<sup>43</sup>

Moreover, in comparison to residential tenancies, the social consequences and severity of distress were less severe in business tenancies. Business tenant is usually expected to have easier access to legal counsel and a clearer understanding of the consequences of breaking the provisions of a lease agreement than residential tenant. Nevertheless, the law commission was firm in its view that although intruding into a tenant's business premises is not as heinous as intruding into a person's home, it may have a disproportionate impact on the tenant's business credibility and goodwill. In addition, seizure and sale of goods at a low value would result in the tenant's insolvency, worsening the tenant's financial problems and harming other creditors.<sup>44</sup> It is obvious that the Law Commission was adamant that the decision to keep a distress remedy should not be based solely on outcomes; while outcomes are important, the means by which those outcomes are achieved, especially when they are "harsh," cannot be overlooked.

Notwithstanding, the Law Commission also taking into account the impact of the abolition of distress remedy. Once distress for rent is eliminated, the three major remaining means of recovering rent arrears are forfeiture, money decisions (e.g., by a default action or rent action), and, in some cases, insolvency. The Law Commission believes that, the use of these remedies is likely to rise when distress is eliminated.<sup>45</sup>

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<sup>42</sup> The Law Commission of England and Wales, op.cit., pp.15-16.

<sup>43</sup> Ibid., p.14.

<sup>44</sup> Ibid., p.14.

<sup>45</sup> Ibid., p.23.

The three major remaining options for recovering rent arrears; however, are all related to the court system. It is obvious that the primary reason for the increased use of distress for rent is the inefficiency of the court system. When distress is eliminated, the consequences of this inefficiency can be worsened since the only remaining remedies for recovering rent arrears require going to court.<sup>46</sup>

According to six consultation papers issued by The Review Body of Civil Justice after comprehensive factual research, delay and expense were two of the most significant problems. More than half of judgment debts in the High Court and county court were wholly or partially unpaid 15 to 18 months after commencement of litigation, the majority of creditors who used the court process to recover monetary debts felt that the system had failed to help them obtain payment. The review of housing cases revealed potential litigants' reluctance to using the court process, and the rent action was deemed ineffective and underutilized, the distress, on the other hand, can be viewed as fast, inexpensive, and convenient.<sup>47</sup>

According to the respondents to the Law Commission's consultation paper, one of the key arguments they gave for supporting the preservation of distress was that the courts would be unable to cope with the work caused by abolition.<sup>48</sup> Indeed, they felt the courts were incapable of dealing with the demands levied on them, and they were widely chided for failure to offer an appropriate solution against defaulting tenants. The cost, delay, ineffectiveness, and complexity of court trials were among the criticisms leveled at the courts.

The landlords stated that even if they get a recovery of cost order, they would be significantly out of pocket as a result of taking processing. The respondents estimated that levying distress to recover a debt of €1000 would cost about €50, while court proceedings could cost hundreds, if not thousands, of pounds with a real risk of the claimant receiving nothing or very little. Many commercial landlords and property managers pointed out that by the time a decision for one quarter's rent was obtained and rent paid, the next quarter's rent would be overdue.<sup>49</sup>

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<sup>46</sup> The Law Commission of England and Wales, op.cit., p.21.

<sup>47</sup> Ibid., p.21.

<sup>48</sup> Ibid., p.24.

<sup>49</sup> Ibid., p.24.

Because of the general sluggishness of the procedure, landlords became concerned that an increased workload would exacerbate delays to the extent of paralyzing the court system. Furthermore, execution by the courts, as well as the lengthy waiting period for possession and payment when seizure proceedings were used, were deemed unsatisfactory. Those opposed to the abolition of distress claimed that the mechanism of execution in the courts, especially the county courts, results in judgments not being satisfied frequently. Besides, respondents to the consultation complained that the courts were biased against tenants. This allowed the experienced tenant the opportunity to exploit the system in order to maximize the delay.<sup>50</sup>

The law commission sent a questionnaire to a number of solicitors, commercial landlords, and courts. They indicated that the issue of delay is critical one, and based on the responses, they believe that the main cause of delay was the overburdening of the court system. As a result of the questionnaire, most landlord strongly despises the court system because it does not provide them with an appropriate method of collecting rent arrears.<sup>51</sup>

Some survey respondents believed that if distress was not available, landlords would be exercising greater caution in selecting tenants than they do when the distress remedy still available. They believed that eliminating distress would discourage investors from purchasing property for investment in rental business, and it would cause significant market implications. Many of those who responded to the consultation agree that the ultimate result would be a slowing of the property market and a shortage of business premises, which will have an effect, especially on new businesses in need of such business premises, as well as on the economy and employment.<sup>52</sup>

According to the Law Commission statement, any creditor has the right to an effective legal remedy; but, for the reasons described above, it may be concluded that the remaining remedies for recovering rent arrears do not always provide this.<sup>53</sup> Landlords should have an effective method of collecting rent arrears, but the measures fall short of the goal, due to the fact that the court system is already overburdened and no longer allows them to function properly. As a result, the Law Commission does

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<sup>50</sup> The Law Commission of England and Wales, op.cit., p.24.

<sup>51</sup> Ibid., p.24.

<sup>52</sup> Ibid., p.25.

<sup>53</sup> Ibid., p.26.

not recommend to abolish distress remedy until the court system is improved and landlords' acceptable standards of a court-based remedy are achieved.<sup>54</sup>

The Law commission recommendation on the distress for rent remedy could lead to the conclusion that the distress remedy should be abolish once improvements to the court system enable other remedies available to landlords effective enough to be considered alternatives to distress. The Law Commission's recommendations were implemented by a Government review of distress in 1998, it took more than 20 years for the Law Commission's recommendations to be implemented in the form of the Tribunals Courts and Enforcement Act 2007 (2007 Act)<sup>55</sup>, which establishes a modern, simpler procedural structure for tribunals, ensuring coherence and allowing future reform.<sup>56</sup>

The Government agreed to follow the Law Commission's recommendation after a process of consultation. However, the consultation showed that distress for rent, especially for commercial properties, is an effective remedy for recovering rent arrears. The government decided that if it were to be repealed without a replacement, it would be detrimental to both landlords and tenants of commercial properties. As a result, the Act repeals the existing legislation on rent distress and replaces it with a modified regime (known as Commercial Rent Arrears Recovery or CRAR) for recovering rent arrears due under commercial leases.<sup>57</sup> Therefore, since 2007 Act come into force, a landlord's right of distress against his tenant to reclaim rent arrears has been repealed, and a new statutory regime for Commercial Rent Arrears Recovery has replaced it (CRAR).

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<sup>54</sup> The Law Commission of England and Wales, op.cit., p.32.

<sup>55</sup> Caroline Shea, op.cit.

<sup>56</sup> Tribunal, Court and Enforcement Act 2007, "explanatory note overview," [www.legislation.gov.uk](http://www.legislation.gov.uk), (accessed May 23, 2021).

<sup>57</sup> Tribunal, Court and Enforcement Act 2007, "explanatory note Part3 Rent arrears recovery," [www.legislation.gov.uk](http://www.legislation.gov.uk), (accessed May 23, 2021).

## 2.5 Definition, General Concept and Evolution of Commercial Lease Agreement

### 2.5.1 Definition and General Concept of Commercial Lease Agreement

A commercial lease is an agreement between a landlord and a business tenant that is legally binding. In exchange for money paid to the landlord, a tenant is given the right to use particular property for a business or commercial activity for a specific length of time.<sup>58</sup>

There is no specific definition of a commercial lease agreement in Thailand; however, it is widely understood that a commercial lease agreement is a rental contract between an individual or a company that operates a business and the owner of the premises, who can be either a company or an individual.<sup>59</sup>

The purpose of this agreement is to provide space for the business tenant for business or commercial activities. The goal of the agreement is to use the leased premise to conducting a business and generate a profit from it. The commercial lease is referring to the retail store, office, restaurant or warehouse as example.

Commercial leases are commonly considered of being agreements between experienced businessmen. As a result, business tenants are generally provided less government protection than residential tenants. The basic idea behind this reason is that because both parties are experienced businesspeople, they should be able to negotiate favorable lease terms. Parties to commercial leases often have more bargaining power and negotiation skill than parties to residential leases.<sup>60</sup>

In Thailand, long-term lease agreements are typically limited to a maximum duration of 30 years and they can be extended for another 30 years by renewed the lease. However, if the lease is for an industrial or commercial purpose, the Lease of Immovable Property for Commercial or Industrial Purposes Act of 1999 allows for a maximum lease period of 30-50 years. After this initial term, a 30-50 year extension

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<sup>58</sup> LawDepot, “Commercial lease agreement FAQ-United Kingdom-England,” [www.lawdepot.co.uk](http://www.lawdepot.co.uk), (accessed August 5, 2021).

<sup>59</sup> Themis Partner, “Learn more about commercial lease agreement,” [www.thailand.themispartner.com](http://www.thailand.themispartner.com), (accessed August 5, 2021).

<sup>60</sup> LawDepot, op.cit.,



is available. This extended term, like a regular long-term lease, can only be filed after the first term has expired.<sup>61</sup>

### 2.5.2 Evolution of Commercial Lease Agreement<sup>62</sup>

Lease agreement in England has its roots in the European history over 1000 years. In Romans time, the land is the thing that present the wealth of the land owner. Tenancy agreements may have their origins at the period when the common law was being established in England throughout the reign of feudalism.

All lands were owned by the king during feudalism. At that period, the lord is responsible for providing soldiers to defend the king. In exchange for their military service and political ties, the king will grant the lords land. This was based on a contract that was signed with oaths and fealty (fidelity). In exchange for the soldier's loyalty, the lord divides the land into smaller parts and grants them to the soldiers as a knight fee.

Correspondingly, in exchange for the labor services, these soldiers as well as the lord himself would give plots of land to peasants who worked for them. The lord's soldiers could be considered the tenant and the peasants could be considered the sub-tenant at the time. This historical background somewhat reflected the modern landlord-tenant and sub-tenant relationships.

At the middle age, the Black Death scourge through Europe causing the death of a third of population. However, the demand for labor service remains strong, resulting in a rise in peasant bargaining power. The surviving peasants begun to bargaining for wages in return for their labor service and agree to pay money rent instead of labor service for living in the land<sup>63</sup>. This situation caused the fall of Feudalism and being basic to rental payment in present.

With the flow of time, international trade has increased significantly. Many merchants go to neighboring countries to expand their trading networks, resulting in increased demand for both residential and commercial space. The rental business has

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<sup>61</sup> Bangkok Post, "Commercial lease agreement and Thai laws," [www.tilleke.com](http://www.tilleke.com), (accessed August 5, 2021).

<sup>62</sup> Neeyada Sirisampandh, op.cit., pp.9-11

<sup>63</sup> Edward P. Cheyney, "The disappearance of English serfdom," [The English Historical Review](#) 15,57, (January 1900): 20-37.



arisen as a result of the rapid growth of such demand, both for residential and commercial purposes.

Trading has revolutionized the lease agreement in Thailand. Ayutthaya was considered a golden age of international trade in the seventeenth century, and its cultures flourished. There are numerous evidences that indicate trade between Siam and other countries. There is no indication that a residential lease agreement or a commercial lease agreement was established at that time. Allowing strangers, especially foreign merchants, to temporarily stay in one's home is discouraged upon in Siam due to security concerns. International merchants who come to Ayutthaya to trade typically stay in a cottage situated along the trading route.

There are accommodations available for international business visitors in early Rattanakosin. Visitors will remain in the premises for free without incurring any costs, but there is no rental business during that time. However, during King Rama 3's reign, commerce between Thailand and foreign countries flourished, resulting in the emergence of the rental industry.

It all started with the residential rental business, when many wealthy people decided to build a house on their land and rent it out to gain profit from foreigners. Agreement signed of the Bowring Treaty with the British Empire, commerce between Thailand and European countries has grown significantly. Many Europeans visit Thailand for trading and business purposes, and the demand for living and business space is growing rapidly. The rental industry is rapidly expanding, both for residential and commercial purposes.

### **2.5.3 Characteristics of Commercial Leases/Rental agreement**

Commercial leasing and renting are terms that are commonly used to describe a business tenancy. However, there are some major differences in how these commercial space arrangements function, as well as the legal consequences of these agreements.

#### **1. Rental Agreement**

The majority of rental agreements are month-to-month, with no long-term commitments. Both the landlord and the tenant have the right to modify the conditions of the rental agreement at the end of each 30-day period. The landlord has

the choice of renting the space to someone else or raising the rent. Similarly, the tenant has the choice to move to another property. Rental agreements usually renew automatically at the end of each month, unless the parties involved agree otherwise.<sup>64</sup>

Generally, in the United Kingdom, rental agreements (also known as lets) are frequently for a short amount of time, with the average property rented lasting three years. Furthermore, a rental agreement does not give the tenant exclusive possession of the property. These are still the landlord's or owner's rights. According to UK property law, if the rental agreement is for less than seven years, the landlord is liable for maintenance and repairs as needed; therefore, the rental agreement does not require the tenant to be responsible for the property's maintenance.<sup>65</sup>

## 2. Lease Agreement

A lease agreement, on the other hand, has a longer term than a rental agreement. It usually has a defined duration and allows tenants to stay in a rental property for a specific amount of time. This is often 12 months, although it can be any length of time, ranging from three months to 24 months or more. Both the landlord and the tenant mutually agree to fixed terms and conditions, such as the amount of rent to be paid, the length of the lease, during the duration of the lease. Neither party may modify these conditions without the other's written approval.<sup>66</sup>

A lease agreement also establishes a number of property rights. This agreement, for example, allows the tenant to have exclusive possession of the area, which can be acquired legally through a contract or by registering the lease with the Land Registry. This implies that the tenant has complete control on who capable to access to the property and under what conditions, as well as the ability to make modifications to it (renovations, alterations, etc.). The tenant can also transfer the lease to a third party with exclusive possession, however this typically requires the landlord's permission.<sup>67</sup>

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<sup>64</sup> Open Access Government, What is the difference between rental agreement and lease agreement, [www.openaccessgovernment.org](http://www.openaccessgovernment.org), (accessed August 11, 2021).

<sup>65</sup> Prime Office Space, "Difference between lease and let," [www.primeoffice.space.co.uk](http://www.primeoffice.space.co.uk), (accessed August 11, 2021).

<sup>66</sup> Open Access Government, op.cit.,

<sup>67</sup> Prime Office Space, op.cit.,

## 2.6 Conclusion

In the United Kingdom, one of the earliest ways for a landlord to recover rent arrears is by a levy Distress remedy. Distress remedy or Distress for rent is an ancient summary remedy that allows landlords to recover rent arrears, which is monetary debt, without going to court by seizing and selling property from the rented premises. With the flow of time, the landlord has had the right, given by a statutory, to sell the goods in order to cover the rent owed. Since distress is an automatic right arising from the duty to pay rent, it is always available to the landlord of premises when rent is in arrears.

However, since Tribunal, Courts and Enforcement Act 2007 come into force, a landlord's right of distress against his tenant to reclaim rent arrears has been repealed, and a new statutory regime for Commercial Rent Arrears Recovery has replaced it (CRAR).

Commercial Rent Arrears Recovery is a legislative framework that has taken the place of the former remedy of rent distress. The CRAR approach is similar to the previous distress scheme in that it does not require a court order to initiate the procedure; all that is needed is a landlord's instruction to the certificated enforcement agents to recover the rent or seize the tenant's property. The CRAR procedure for rent arrears recovery will be discussed in further detail in the following chapter.

## Chapter 3

### The Law Concerning Debt Recovery in Commercial Lease Agreement

#### 3.1 Debt Recovery in Commercial Lease Agreement: United Kingdom

The English law provides a commercial landlord with an alternative means to recover rent arrears under a commercial lease agreement, known as Commercial Rent Arrears Recovery (CRAR), in addition to a court-based remedy.

As mentioned in Chapter 2, in 2014, the Commercial Rent Arrears Recovery (CRAR) regime replaced the former common law distress remedy for rent arrears. CRAR, like the previous law of distress, is a "self-help" remedy which does not require judicial intervention.

The CRAR procedure is allowed under the Tribunal Courts and Enforcement Act 2007, chapter 2, section 72. According to the Act, the procedure under Schedule 12 (taking control of goods) can be used by a certificated enforcement agent on behalf of the landlord to recover rent due under a commercial lease from the tenant.<sup>68</sup> The CRAR procedure provides a landlord an ability to instruct a certificated enforcement agent to take control of tenant's goods and auction off a tenant's goods in order to recoup rent arrears.

However, there are a few fundamental requirements that must be satisfied before the landlord may use CRAR to instruct a certified enforcement agent to perform this task, which will be detailed in the next part.

##### 3.1.1 The Commercial Rent Arrears Recovery's Fundamental Requirements

The structure and fundamental elements of the Commercial Rent Arrears Recovery (CRAR) are defined in Part 3 of the Tribunal, Court and Enforcement Act, while the mechanics of enforcement are outlined in Schedule 12 of the same Act. The Commercial Rent Arrears Recovery (CRAR) consists of the following fundamental elements:

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<sup>68</sup> Tribunal, Court and Enforcement Act 2007, Section 72.

## 1. Landlord

In the context of a lease, the term "landlord" refers to the person who is entitled to the immediate reversion in the property covered by the lease.<sup>69</sup> The immediate landlord is the one who receives the rent and has the right to vacant possession of the leased premises after the lease expires.<sup>70</sup> The term immediate landlord does not always imply owner of a property. A landlord might also be those who are represented on the lease agreement and has a right to possession through another means, such as subletting from a superior landlord.<sup>71</sup>

If the property is co-owned, the landlord may refer to any of the co-owners, and it is further specified that CRAR may be used to collect rent owed to all of them<sup>72</sup>. If the premises are mortgaged, the landlord is referred to as a mortgagee if the mortgagee has given notice of its intention to take possession or receive rent and profits, and the mortgagee is obligated by the lease; otherwise, it refers to the mortgagor.<sup>73</sup>

## 2. Lease

A lease that qualifies for the CRAR procedure must be a legal or equitable tenancy that is proven in writing.<sup>74</sup>

In terms of the legal tenancy, according to section 52 of Land Property Act 1925 (LPA), unless done by deed, all conveyances of land or any interest therein are invalid for the purpose of transferring or forming a legal estate<sup>75</sup>. A deed is a written and signed legal document that transfers ownership or any interest in real estate from the grantor to the grantee.<sup>76</sup>

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<sup>69</sup> Tribunal, Court and Enforcement Act 2007, Section 73(1).

<sup>70</sup> Ministry of housing, Communities & Local Government, "Right of first refusal," [www.lease-advice.org](http://www.lease-advice.org), (accessed August 8, 2021).

<sup>71</sup> Guildy, "A landlord guide to rent smart Wales, registration, and licensing," [www.landlordsguild.com](http://www.landlordsguild.com), (accessed August 8, 2021).

<sup>72</sup> Tribunal, Court and Enforcement Act 2007, Section 73(4).

<sup>73</sup> Section 73 (5)-73(6).

<sup>74</sup> Section 74.

<sup>75</sup> Land Property Act 1925, Section 52.

<sup>76</sup> Jean Folger, "Understanding property deed," [www.investopedia.com](http://www.investopedia.com), (accessed August 8, 2021).

However, according to Section 54(2) LPA, if the initial duration of the lease does not exceed 3 years a lease does not need to be formed in writing.<sup>77</sup> Additionally, if the lease is for a period of more than seven years and is formed over a registered estate in land, the lease must be registered in order to be valid.<sup>78</sup>

As a result, a legal tenancy can refer to both a written lease having a term of more than three years and a non-written lease with a duration of less than three years that fulfills particular requirements set out in the Land Property Act and Land Registration Act, notably the registration requirement.

Equitable leases are those that are not formed under Section 54 (2) of the LPA 1925 or by deed. However, it must be for a monetary consideration and must meet the conditions of Section 2 of the Law of Property (Miscellaneous Provisions) Act of 1989. This clause specifies that the lease must be in writing and include all clearly agreed-upon conditions signed by or on behalf of both parties.<sup>79</sup>

Although CRAR is not normally exercisable beyond the expiration of a lease, it is nonetheless exercisable in the following circumstances<sup>80</sup>: in the event that goods are taken control of before the lease expires, or if rent is due and payable before the lease expires, provided that:

- (1) The lease did not expire due to forfeiture
- (2) The lease did not expire more than six months ago
- (3) The rent was due from the person who was the tenant at the lease's end
- (4) The person retains possession of any part of the premises, and any new lease under which that person retains possession is a commercial lease (though it does not have to be in writing); and
- (5) The person who was the landlord at the end of the lease retains the right to the immediate reversion

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<sup>77</sup> Land Property Act 1952, Section 54(2).

<sup>78</sup> Land Registration Act 2002, Section 27(2)(b)(i).

<sup>79</sup> Law of Property (Miscellaneous Provisions) Act of 1989, Section 2.

<sup>80</sup> Tribunal, Court and Enforcement Act 2007, Section 79.



### 3. Commercial Premise

CRAR can only be used to recover rent from leases of commercial premise<sup>81</sup>. It cannot be utilized to collect rent in the case of mixed-use or residential premise. This includes premises where the lease or any sublease permits residential use, even if they are not actually used as a habitat, or that the tenant is occupied as a residence, unless the contract expressly prohibits it.<sup>82</sup>

It could be concluded that the 2007 Act does not define a commercial premise as one that is occupied or rented as a residence or is mixed use; thus, it cannot be used to recover rent in the case of mixed-use or residential properties.

### 4. Rent

CRAR may only be used against pure rent, which is the sum due under the lease for the occupancy and use of the premises, plus any applicable VAT and interest. It excludes payments for anything else, including service charges, repairs, maintenance, and insurance, even if they are listed in the lease as rent.<sup>83</sup> In the case of an inclusive rent, such as a mortgage pays for an all-inclusive rent, the amount of rent for CRAR purposes is the proportion of rent that may be rationally attributed to possession and use of the premises.<sup>84</sup>

Furthermore, in order for using CRAR, the rent must be due and payable prior to the issuance of the notice of enforcement. Both immediately before the notice of enforcement is delivered and when the goods are first seized, the rent must be able to be calculated with certainty, taking into account any applicable deductions, and the "net unpaid rent" must be greater than the minimum amount of seven days' rent.<sup>85</sup> 'Net unpaid rent' refers to the amount of rent for which CRAR can be used, excluding any interest or VAT included in the rent, as well as any deduction, liquidated damages, or set-off that the tenant might be allowed to claim in a landlord-tenant dispute over the rent.<sup>86</sup>

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<sup>81</sup> Tribunal, Court and Enforcement Act 2007, Section 75.

<sup>82</sup> Section 75(5).

<sup>83</sup> Section 76.

<sup>84</sup> Section 76(3).

<sup>85</sup> Section 77(3).

<sup>86</sup> Section 77(5).

### 3.1.2 The Taking Control of Goods Procedure

The capacity of a creditor to recover debts by seizing and selling the debtor's property, through common-law or statutory rights which do not involve the courts, has been formalized in statute, putting in place a highly regulated process.

The procedure for taking control of goods is outlined in Schedule 12 of the Tribunal, Court and Enforcement Act. Such a Schedule lays out in detail the procedure that enforcement agents must follow when seizing and selling goods to recover money on the instructions of a commercial landlord who is owed rent arrears.

#### 1. Commercial Rent Arrears Recovery Instruction Form

In order for the landlord to initiate the Commercial Rent Arrears Recovery procedure, the landlord need to instructs the certificated enforcement agent by completing an online Commercial Rent Arrears Recovery instruction form and attaching a copy of the lease.



[illegible]

Picture number 4.1 The example of the CRAR instruction form<sup>87</sup>

### 1. The Notice to the Tenant

Following the landlord's instruction to the enforcement agent to initiate the CRAR procedure, unless the court decides differently<sup>88</sup>, the enforcement agent is obligated under the taking control of goods rules to provide the commercial tenant 7 clear days' notice before taking control their goods to recover rent arrears<sup>89</sup>. A "Notice of Enforcement" is what this is called. Sundays, bank holidays, Good Friday, and Christmas Day are not included in the period calculation.<sup>90</sup>

The notice of enforcement must be in writing and include the required information, such as the tenant's name and address, any reference number, the date of the notice, the fact that the debt is enforceable under TCEA 2007, s 72 etc. The notice must be sent to the tenant by the enforcement agent or their office via post, hand delivery (at the tenant's home, place of business, or registered office), fax, or email, or be posted somewhere where it will be seen by the tenant.<sup>91</sup> Nevertheless, the court has the authority to dismiss the notice or order that no further CRAR actions be conducted.<sup>92</sup>

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<sup>88</sup> The Taking Control of Goods Regulation 2003, Regulation 6(3).

<sup>89</sup> Tribunal, Court and Enforcement Act 2007, Schedule 12, Paragraph 7, SI 2013/1894, regulation 6.

<sup>90</sup> Ibid.

<sup>91</sup> The Taking Control of Goods Regulation 2003, Regulation 7–8.

<sup>92</sup> Tribunal, Court and Enforcement Act 2007, Section 78.



Picture 4.2 the example of a notice of enforcement<sup>93</sup>

In practice, unless the landlord has agreed to personal service, the notice of enforcement is generally issued through post and email. It will take generally 12 days for the enforcement agent to attend to take control of the goods after they are mailed, allowing for delivery time. When personally served, the enforcement agent will attend 9 days later and take control of the goods.<sup>94</sup>

At the time the notice is delivered, as well as before any goods are taken, the rent must still be overdue. This gives the business tenant time to acquire funds to pay the rent arrears before the enforcement agent begins the process of taking control any goods found in the leased premises.

## 2. Effect of Notice

<sup>93</sup> Keith Steven, "What is an HMRC notice of enforcement," [www.companyrescue.co.uk](http://www.companyrescue.co.uk), (accessed June 24, 2021).

<sup>94</sup> Quality Bailiff, "CRAR-Commercial Rent Arrears Recovery," [www.qualitybailiffs.co.uk](http://www.qualitybailiffs.co.uk), (accessed June 24, 2021).

Notice binds the property in the tenant's goods to the enforcement agent from the moment the notice is issued until: the goods are sold; or the outstanding amount is paid, either from the proceeds of the sale of the goods or in some other way; or CRAR ceases to be exercisable for some other reason.<sup>95</sup>

During such time, the tenant is unable to assign interests in the bound goods. However, a person who obtains ownership to bound goods in good faith (i.e., honestly, whether negligently or not) for valued consideration and without knowing of the enforcement agent's notice and that goods were bound, on the other hand, is not disadvantaged.<sup>96</sup>

### **3. Duration of Notice**

Unless an application is made to extend the time restriction, the enforcement agent must seize the tenant's goods within 12 months of the date of the notice. There are, however, certain exceptions, such as when a tenant promises to pay the outstanding balance in installments, the 12-month term begins on the date the debtor breaks any arrangement for repayment of the debt entered into with the enforcement agent.<sup>97</sup>

### **4. Entry on the Premise**

The enforcement agent may enter and take custody of goods at any time throughout the week, but only between the hours of 6 a.m. and 9 p.m., subjected to certain exceptions. The exceptions are if the goods are placed on premises that are used for a trade or business and are open during ordinarily forbidden hours (for example, a nightclub), or where the court has made an order to the otherwise, or The enforcement agent has started taking control of goods during non-banned hours, but will need to continue into typically prohibited hours to finish the exercise.<sup>98</sup>

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<sup>95</sup> Tribunal, Court and Enforcement Act 2007, Schedule 12, Paragraph 4(4), 6.

<sup>96</sup> Schedule 12, Paragraph 5.

<sup>97</sup> Tribunal, Court and Enforcement Act 2007, Schedule 12, Paragraph 8, The Taking Control of Goods Regulation 2003, Regulation 9.

<sup>98</sup> The Taking Control of Goods Regulation 2003, Regulation 12, 13, 21, 22.



Only a door or other common means of access shall be used by the enforcement agent to enter or re-enter the premises.<sup>99</sup> If the debtor is not a minor, or if a minor and/or a vulnerable person is not the only person in the premises, the enforcement agent may enter, re-enter, or remain on the premises.<sup>100</sup>

## **5. Notice upon Entry**

The enforcement agent must provide the tenant a notice stating what they are doing after accessing the premises. It must be presented to the tenant at the time of the inspection (if the tenant is present) or placed in a visible spot.<sup>101</sup>

The notice must be in writing and signed by the enforcement agent, and must include required information such as the enforcement agent's name, the location of goods in the case where the enforcement agent has taken control of goods, where and time when control was taken, as well as a list of the goods with full details, the deadline for payment to prevent the goods from being sold, and how and when to pay.<sup>102</sup>

## **6. The Goods that can be Taken**

An enforcement agent may only seize goods that belong to the tenant and are on the demised premises or on a roadway.<sup>103</sup> Unless there are inadequate goods of a lower value, an enforcement agent is generally prohibited from seizing goods whose total worth exceeds the outstanding amount plus an amount to cover future costs.<sup>104</sup>

## **7. The Goods that cannot be Taken**

The goods that could not be seized are those that are used as trade tools. Only a tool up to £1,350 in value that are deemed to be tools essential for the tenant to sustain their trade are exempt from seizure.<sup>105</sup> Clothing, bedding, furniture,

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<sup>99</sup> The Taking Control of Goods Regulation 2003, Regulation 20.

<sup>100</sup> Regulation 23.

<sup>101</sup> Tribunal, Court and Enforcement Act 2007, Schedule 12, Paragraph 28.

<sup>102</sup> The Taking Control of Goods Regulation 2003, Regulation 30–32.

<sup>103</sup> Tribunal, Court and Enforcement Act 2007, Schedule 12, Paragraph 9.

<sup>104</sup> Schedule 12, Paragraph 12.

<sup>105</sup> The Taking Control of Goods Regulation 2003, Regulation 4.

home equipment, and goods reasonably necessary to meet the tenant's and their household's basic domestic requirements, for example, are also excluded from control.<sup>106</sup>

In addition, an enforcement agent may not seize goods if: the item is being used by someone at the time the enforcement agent is attempting to seize it, and such action is likely to create a disturbance. Also, the enforcement agent cannot seize goods on the highway that pose a severe danger to the public, which the enforcement agent is aware of or should be aware of.<sup>107</sup>

### **8. The Methods of Taking Control of Goods<sup>108</sup>**

#### **1) A controlled goods agreement<sup>109</sup>**

It is an agreement in which the debtor retains custody of the goods while acknowledging that the enforcement agent is in control and promises not to remove or dispose of them, or allow anyone to do so, until the debt is paid.

#### **2) Securing items on the premises**

3) Secure goods on a public Highway, if the enforcement agents find them on a Highway.

4) Removal from the premises and secure them elsewhere, as long as the location is within a reasonable distance of where the goods were taken control of.<sup>110</sup>

### **9. Inventory**

The enforcement agent must provide the tenant with an inventory as soon as possible. If the goods are co-owned, the enforcement agent must create two inventories, one for jointly owned goods and one for goods owned solely by the tenant, and provide copies to the tenant and each co-owner. A copy of the notice must also be given to the co-owner upon entry. The inventory can be combined with a controlled

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<sup>106</sup> The Taking Control of Goods Regulation 2003, Regulation 4–5.

<sup>107</sup> Regulation 10–11.

<sup>108</sup> Tribunal, Court and Enforcement Act 2007, Schedule 12, Paragraph 13.

<sup>109</sup> Schedule 12, paragraph 13(4).

<sup>110</sup> The Taking Control of Goods Regulation 2003, Regulation 19.

goods agreement or a notice of entry, as long as the list of goods in each is the same and supplied at the same time.<sup>111</sup>

## 10. Valuation and Notice of Sale

A valuation of the goods must be obtained by the enforcement agent. They can either do it themselves or hire an independent valuers to do it for them. The valuation must be written and a copy must be given to the tenant and any co-owners of the goods. The agent must also provide the tenant and any co-owners with the option to get their own valuation.<sup>112</sup>

The enforcement agent must wait seven clear days after removing the goods before selling them (unless the tenant and any co-owner agree, or the goods become unsaleable or their value significantly decreases).<sup>113</sup>

The enforcement agent must give at least seven days' notice to the tenant and any co-owners of the property of the date, time, and location of the sale. Unless the tenant agrees otherwise, notice must be given within 12 months of taking possession of the goods. The agent is deemed to have abandoned the goods if notice is not given by the deadline, and is obligated to return them to the tenant.<sup>114</sup>

## 11. Sale of Controlled Goods

The enforcement agent must notify the debtor and any co-owners of the date, time, and location of the sale at least seven clear days before the sale.<sup>115</sup> The purpose of the notification is to offer the debtor or co-owner a chance to settle the unpaid amount before the goods are auctioned.

The notice must be in written and include the debtor's, co- owner's, and enforcement agent's information. The notification must clarify that the goods, which

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<sup>111</sup> Tribunal, Court and Enforcement Act 2007, Schedule 12, Paragraph 34.

<sup>112</sup> Schedule 12, Paragraph 36, The Taking Control of Goods Regulation 2003, Regulation 35.

<sup>113</sup> The Taking Control of Goods Regulation 2003, Regulation 37.

<sup>114</sup> Tribunal, Court and Enforcement Act 2007, Schedule 12, Paragraph 40, 53–54.

<sup>115</sup> Tribunal, Court and Enforcement Act 2007, Schedule 12, Paragraph 40, The Taking Control of Goods Regulation 2003, Regulation 38.

must be stated in such a way that the debtor or co-owner can accurately identify them, may be auctioned if the debtor does not pay the due amount. It must also provide information on the debt and the amount required to agree to or avoid a sale.<sup>116</sup>

Unless the court orders otherwise, the sale must be held at a public auction. The court may order a sale by other approaches, such as private contract, sealed bids, or advertisement, if the enforcement agent makes an application.<sup>117</sup> Unless the debtor and any co-owner agree, the sale of controlled goods cannot take place before the expiry of the seven-day period following the removal of the controlled goods.<sup>118</sup>

If the goods become unsaleable or their worth is destroyed or considerably decreased owing to the nature or any attribute of such goods, the sale may take place on the day after removing controlled goods for sale.<sup>119</sup> It is the enforcement agent's responsibility to assure that the controlled goods are sold or disposed of at the best price that can reasonably be achieved.<sup>120</sup>

## **12. Proceed of Sale**

Proceeds from the sale of any goods or money obtained through the use of an enforcement power must be used to pay the outstanding balance, including costs. Any excess money owed must be returned to the tenant. If there is a co-owner, they must be paid proportionately to their share of the proceeds before the remaining is distributed.<sup>121</sup>

Fees for taking control of goods are recoverable from the debtor on a set basis at each stage of the procedure, but in some circumstances (such as when

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<sup>116</sup> The Taking Control of Goods Regulation 2003, Regulation 39.

<sup>117</sup> Tribunal, Court and Enforcement Act 2007, Schedule 12, Paragraph 41, The Taking Control of Goods Regulation 2003, Regulation 41.

<sup>118</sup> Tribunal, Court and Enforcement Act 2007, Schedule 12, Paragraph 39, The Taking Control of Goods Regulation 2003, Regulation 41.

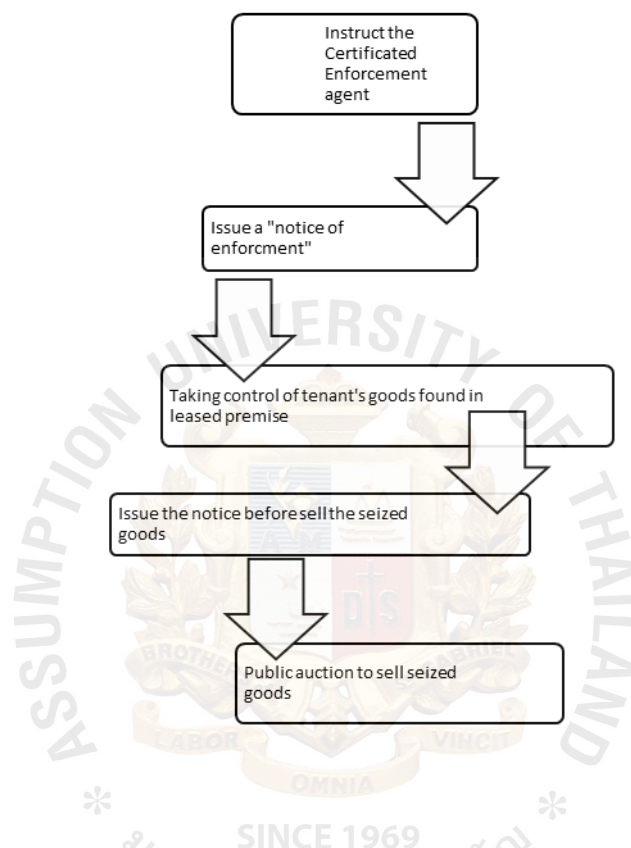
<sup>119</sup> The Taking Control of Goods Regulation 2003, Regulation 37(2).

<sup>120</sup> Tribunal, Court and Enforcement Act 2007, Schedule 12, Paragraph 37.

<sup>121</sup> Schedule 12, Paragraph 50.

assets are auctioned), an extra charge is payable as a percentage of the amount to be recovered.<sup>122</sup>

From the taking control of goods procedure describe above, the taking control of goods procedure chart can be constructed as below:



Picture 4.3 the taking control of goods's procedure chart

### 3.1.3 Certificated enforcement agent

#### 1. An overview of an enforcement agent

Enforcement agents are those who collect outstanding debts on behalf of creditors in the United Kingdom (including local authorities, government departments and private creditors through County Court judgments). They have the legal authority to seize and sell goods using warrants and writs of control (for the County and High Courts, respectively) in order to pay the debtor's debt and costs.<sup>123</sup>

<sup>122</sup> Taking Control of Goods (Fees) Regulation 2014, paragraph 1.

<sup>123</sup> Lorraine Conway, "Enforcement officers (formerly known as bailiffs)," [www.researchbriefings.files.parliament.uk](http://www.researchbriefings.files.parliament.uk), (accessed August 5, 2021).

In the United Kingdom, there are several types of enforcement agents who are employed to collect different forms of debts, including:<sup>124</sup>

- a) Certificated enforcement agents
- b) High Court enforcement officers
- c) County Court bailiffs
- d) Civilian Enforcement officers.

Certificated enforcement agents are individuals who have been authorized by a court or a commercial landlord to take control of the goods in order to recover debts such as rent arrears, council tax arrears, or parking penalties. The majority of certificated enforcement agent work for private enforcement firms. They are not court officers, despite the fact that the court has certified them. The certification process gives the court some control over the enforcement officers' qualifications and conduct.<sup>125</sup>

The Ministry of Justice has given a High Court Enforcement Officer particular authority to execute higher-value judgments known as High Court Writs. They are private enforcement agents appointed by the creditor to enforce High Court orders as well as any County Court orders that the creditor submits to the High Court for enforcement. They are capable of recovering debts such as a tribunal award and corporate debt. High Court Enforcement Officers, on the other hand, are unable to enforce court judgments in the case of regulated debt. Credit card debt, personal loans, and overdrafts are examples of regulated debt.<sup>126</sup>

County Court bailiffs are directly employed by the courts. They do not need to be certified because they work for the government. The bailiff's authority to operate derives from the warrant of control when recovering money under a Country Court judgment. They have the authority to take control goods in order to recover money owing under the order as well as associated fees.<sup>127</sup>

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<sup>124</sup> Lorraine Conway, Ibid.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid.



The Magistrates Court employs Civilian Enforcement Officers (CEOs) under Section 92 of the Access to Justice Act 1999, the Magistrates Courts (Civilian Enforcement Officers) Rules 1990, and the County Courts Act 2003.<sup>128</sup>

## 2. Qualification for a Certificated Enforcement Agent

A Certificated enforcement agent, in the context of Commercial Rent Arrears Recovery, is a person appointed under Part 3 of the Tribunals, Courts and Enforcement Act 2007, who, when directed by the commercial landlord, may take control of goods and sell them to settle a debt.

The certification of enforcement agents Regulations 2014 outline the conditions that must be met before an individual may be certified to work as an enforcement agent. This includes filing an application with the County Court<sup>129</sup>. A judge then reviews the application and, if satisfied, issues a certificate.<sup>130</sup>

The certification of enforcement agents Regulations 2014 went into effect on April 6, 2014. The goal of this new regime is to prevent aggressive enforcement, such as excessive charging, as well as to protect against inappropriate enforcement agent behavior, such as threatening behavior and misrepresentation of legal authority.<sup>131</sup>

The following are the requirements that must be met in order to acquire such certification:<sup>132</sup>

- a) He is a suitable candidate for the position of certificate holder.
- b) He has adequate understanding of the law and procedure pertaining to the powers of enforcement by taking control of goods and the recovery of commercial rent arrears to be qualified to use them.
- c) He has put a £10,000 security deposit in case he is asked to pay any charges, fees, fines, or compensation as a result of unlawfully exercising his office.
- d) He isn't in the debt collecting business.

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<sup>128</sup> Lorraine Conway, *Ibid.*

<sup>129</sup> The Certification of Enforcement agent Regulation 2014, Section 2.

<sup>130</sup> Section 3.

<sup>131</sup> Lorraine Conway, *op.cit.*

<sup>132</sup> The Certification of Enforcement Agent Regulation 2014, Section 3(b).

An enforcement agent acting on behalf of a landlord has the authority to exercise CRAR.<sup>133</sup> An individual may not act as an enforcement agent unless:<sup>134</sup>

- a) He or she obtains a certificate from the county court.
- b) He is not obliged to have such a certificate, such as he is a constable, a Revenue and Customs officer, a court officer or staff member, or he is acting in the course of his or her responsibilities as a government department office.
- c) He is acting in the company of and under the supervision of a certificate holder or an exempt person.

Any agent's authority to conduct Commercial Rent Arrears Recovery must be in written and signed by the landlord. The date of authorization, the landlord's name and contact information, the enforcement agent's name and contact information, details of the relevant business premises, the amount of rent owed, and the duration for which rent is owed must also be included in this document.<sup>135</sup>

### 3.2 Debt recovery in Commercial Lease Agreement: Thailand

The Civil and Commercial Code governs all lease agreements in Thailand, whether commercial or residential. According to the Code, commercial property rentals of more than three years must be registered with the Land Department and cannot exceed a duration of 30 years.

However, a commercial real estate lease, which is a lease of a property used only for business purposes or to offer a workplace, has traditionally needed a long lease period. As a result, if the lease has an industrial or commercial purpose, Thai law allows for a maximum lease period of 30-50 years in certain conditions. The Lease of Immovable Property for Commercial or Industrial Purposes Act of 1999 governs a commercial lease for such a lengthy period of time.

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<sup>133</sup> Tribunal, Court and Enforcement Act 2007, Schedule 12, Paragraph 2(2).

<sup>134</sup> Section 63.

<sup>135</sup> The Taking Control of Goods Regulation 2003, Regulation 51.

### 3.2.1 The Fundamental Requirement for Qualifying as a Commercial Lease under the Lease of Immovable Property for Commercial or Industrial Purposes Act of 1999

#### 1. Landlord

An immovable property must be owned by the landlord or lessor.

#### 2. Lease

This Act applies to leases of immovable property for commercial and industrial purpose with a term of more than 30 years but not more than 50 years<sup>136</sup>. The lease must also be written and registered with the appropriate authority; otherwise, it will be null and void.<sup>137</sup>

Upon the expiration of the lease terms, both parties may agree in writing to extend the lease for a period of not more than 50 years from the date of the agreement, which must be registered with the relevant authorities<sup>138</sup>. This extended term, like a regular long-term lease, can only be filed after the first term has expired.

If the lease is for commercial purposes, the business must prove a minimum investment of 20 million baht<sup>139</sup>. If the lease is for industrial purposes, the industry must be one that is qualified for investment promotion under Thailand's Investment Promotion Act and related legislation.<sup>140</sup> A commercial or industrial business that the Interior Minister has proclaimed and declared as advantageous to Thailand's economy and society is also able to register a commercial lease.<sup>141</sup>

According to the Ministerial regulation for Chachoengsao, Chonburi, and Rayong Province's Town Planning, the term "commercial purpose" refers to the

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<sup>136</sup> The Lease of Immovable Property for Commercial or Industrial Purposes Act of 1999, Section 3.

<sup>137</sup> Section 4.

<sup>138</sup> Section 4.

<sup>139</sup> Ministerial regulations Issued under the Lease of Immovable Property for Commercial or Industrial Purposes Act, Section 5(1).

<sup>140</sup> Section 5(2).

<sup>141</sup> Section 5(3).

operation of a business, trade, or service; nevertheless, it excludes fuel or natural gas service stations, and some type of factory that create a high amount of pollution.<sup>142</sup>

### 3. Leased Property

The leased property must be an immovable property and must be in a zone designated for industrial or commercial use or an industrial estate zone.<sup>143</sup>

If the property to be leased is greater than 100 rai, additional criteria apply: the local council where the land is situated must be given the opportunity to respond on the lease application<sup>144</sup>.

Only enterprises that benefit Thailand's exports, employment, manufacturing technologies, or are otherwise vital or helpful to the country's economy and society are qualified to register such a commercial lease.<sup>145</sup> If the tenant is not Thai, a minimum investment of 100 million baht or more is required.<sup>146</sup>

#### 3.2.2 Debt Recovery Procedure

The Lease of Immoveable Property for Commercial or Industrial Purposes Act of 1999 does not provide a specific debt collection method for leases covered by the Act. As a result, in order for the landlord to collect any debt arising from the commercial lease, the landlord must file a claim for compulsory performance with the court, or, in other words, initiate the civil court proceeding as prescribed by the Civil and Commercial Code.

If a landlord obtains a judgment against a default tenant and the tenant fails to comply with the judgment, the landlord must initiate the execution procedure for enforcing a judgment as specified by the Civil Procedure Code.

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<sup>142</sup> Rayong Province Town Planning Ministerial Regulation, Section 6.

Chonburi Province Town Planning Ministerial Regulation, Section 6.

Chachoengsao Province Town Planning Ministerial Regulation, Section 8.

<sup>143</sup> Ministerial regulations Issued under the Lease of Immoveable Property for Commercial or Industrial Purposes Act, Section 4.

<sup>144</sup> Ministerial regulations 2nd Issued under the Lease of Immoveable Property for Commercial or Industrial Purposes Act, Section 3.

<sup>145</sup> Section 2.

<sup>146</sup> Section 6.

In General, there are two ways to carry out the execution procedure: by an executing officer or by court. The executing officer is responsible for the following types of executions: monetary judgment enforcement, judgment for delivery, and eviction judgment. The judgment for performance or the restraint from performing any act is an example of an execution that the court can carry out.

During the execution stage, the executing officer is empowered to secure adequate money for the payment by seizing or attaching the judgment debtor's property and attach an amount of money to be paid by a third party to the judgment debtor to collect it. Moreover, the executing officer is empowered to sell those seizure and attached properties by auction in order to convert it into money.<sup>147</sup>

It is critical to highlight that the judgment debtor's property may not be seized or attached in excess of what is necessary to ensure payment to the judgment creditor.<sup>148</sup> Some of the judgment debtor's assets are not subject to execution. For example, requisites for wearing garments and bedding, or instruments for use in the house and cooking, or equipment or instruments required for earning a livelihood or for his work.<sup>149</sup>

Generally, the property that can be seized is confined to the judgment debtor's movable and immovable property; however, the execution officer may seize the debtor's spouse in specific circumstances if two conditions are satisfied: it is a debt for which both couples are jointly accountable under Section 1490 of the Civil and Commercial Code and the only property that can be seized is Sin Somros under Section 1470 of the Civil and Commercial Code.<sup>150</sup>

The debt for which both couples are jointly accountable are consist of:<sup>151</sup>

1. Debts acquired in connection with household management and providing for the family's necessities, household medical bills, and adequate education of the children
2. Debts acquired as a result of the Sin Somros

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<sup>147</sup> The Civil Procedure Code, Section 296.

<sup>148</sup> Section 300.

<sup>149</sup> Section 301.

<sup>150</sup> Section 297.

<sup>151</sup> The Civil and Commercial Code, Section 1490.

3. Debts accumulated by the spouses as a result of a business that they run jointly

4. Debts acquired solely for the advantage of one spouse but confirmed by the other.

Sin Somros are consist of:<sup>152</sup>

1. The property gained during the marriage
2. property obtained by either spouse during marriage by a testament or as a gift with a written document, and which testament or document defines the property to be Sin Somros
3. The fruits of Sin Suan Tua

The execution officer can seize Sin Somros of the spouse if two of the aforementioned conditions are satisfied, even though the spouse is not a judgment debtor. However, if the judgment debt is not one for which both spouses are jointly liable, the executing officer can only seize Sin Somros in the part of the spouse who is the judgment debtor.<sup>153</sup> Furthermore, even if the judgment debt is one for which both spouses are jointly liable, the execution officer is unable to seize the spouse who is not a judgment debtor's Sin Suan Tua.<sup>154</sup>

### 3.2.3 The Executing Officer

The executing officer is an officer assigned to the Legal Execution Department who is responsible for carrying out any measures required by Division IV of the Civil Procedure Code to defend a party's rights during a trial or to enforce a judgment or order, and includes the person act for executing officer.<sup>155</sup> As a result, under Thai law, the executing officer consists of an officer assigned to the Legal Execution Department and the person designated by the executing officer to function as the executing officer.

After the court issues a writ appointing the executing officer, the executing officer is authorized to receive performance and deposits from the judgment debtor on

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<sup>152</sup> The Civil and Commercial Code, Section 1474.

<sup>153</sup> The Supreme Court Judgment No. 8820/2561.

<sup>154</sup> No. 2740/2559.

<sup>155</sup> The Civil Procedure Code, Section 1(14).



behalf of the judgment creditor and to carry out all measures of execution prescribed by the court in the writ of execution as if he is a clerk of justice.<sup>156</sup>

### 3.3 Conclusion

In the United Kingdom, the law allows the commercial landlord to use Commercial Rent Arrears Recovery (CRAR) procedure to recoup rent arrears without the need for court order or court involvement, in addition to getting a court judgment against the default tenant and enforcing that judgment to recover monetary debt for a commercial lease agreement. However, there are a few fundamental requirements that must be satisfied before the landlord may use CRAR to instruct a certified enforcement agent to perform this task.

The CRAR procedure can be used by a private enforcement agent who is either self-employed or employed by a commercial firm to recover rent arrears; no court order is required to start the procedure. To initiate the CRAR procedure, the landlord just needs to instruct the certificated enforcement agent by filling out an online instruction form and attaching a copy of the lease.

In Thailand, on the other hand, the landlord must initiate a civil lawsuit and obtain a court judgment against the default tenant in order to recover debt owed to the landlord under a commercial lease agreement. And, in accordance with the Civil Procedure Code, begin the execution process to enforce the judgment.

The executing officer assigned to the Legal Execution Department, a public body, is in charge of carrying out the execution procedure. It's important to note that to enable the executing officer to carry out the execution procedure, the court must first issue the writ of execution. The executing officer is not entitled to accept performance and deposits from the judgment debtor on behalf of the judgment creditor until the court has issued a writ of execution.

It could be concluded that the court plays a significant role in recovering debts for commercial lease agreement in Thailand. Every stage of debt recovery requires the involvement of a court. Rent arrears for commercial lease agreements, on the other hand, can be recovered in the United Kingdom using the CRAR procedure, which does not require

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<sup>156</sup> The Civil and Commercial Code, Section 278.

judicial intervention; hence, it is a relatively quick and convenient method of recovering monetary debt for the landlord, and it may be considered a low-cost option.



## Chapter 4

### The Analysis of Debt Recovery Problem, under the Lease of Immovable Property for Commercial or Industrial Purposes Act of 1999, through Commercial Rent Arrears Recovery (CRAR)

#### 4.1 The Analysis of the Problem with the Implementation of Commercial Rent Arrears Recovery in the Thai Legal System

##### 4.1.1 An Analysis of the Problem of the Commercial Rent Arrears Recovery on its Fundamental Requirements

Before the landlord may utilize CRAR to instruct a certified enforcement agent to perform this task, a few fundamental requirements must be met, as outlined below.

1. The term "landlord" refers to the person who is entitled to the immediate reversion in the property covered by the lease.
2. The lease must be legal lease and must be made in written.
3. The property must be entirely commercial, not residential, unless it is leased separately.
4. Under CRAR, the recoverable debt is limited to just pure rental arrears. There must be at least a 7-day rent arrears and the amount of arrears claimed must be definite or calculable with precision.

The following is an analysis of the feasibility of adopting the fundamental requirements of the CRAR into the Lease of Immovable Property for Commercial or Industrial Purposes Act of 1999:

##### 1. Landlord

According to the Lease of Immovable Property for Commercial or Industrial Purposes Act of 1999 (1999 Act), the term landlord refer to the owner of the property. Although the term "landlord" is defined in the CRAR to include not only the property owner, but also those who are represented on the lease agreement and receive the rent, as well as those who have the right to vacant possession of the leased

premises after the lease expires, which differs from the definition of landlord in the 1999 Act.

To provide a broader range of landlords capable of providing a property for investors to establish a business in Thailand in order to boost the economy, the 1999 Act should implement the term "landlord" from the CRAR to include not only the property owner, but also the person who is entering into the lease agreement.

## **2. Lease**

A lease that qualifies for the CRAR procedure must be a legal or equitable tenancy that is proven in writing. The term "legal lease" refers to a deed-based lease that complies with the Land Property Act and Land Registration Act, particularly the registration requirement. To put it simply, a legal lease in the United Kingdom is one that is made written and signed by both parties.

According to the Lease of Immovable Property for Commercial or Industrial Purposes Act of 1999, the legal lease refer to a lease of an immovable property for the commercial or industrial purpose made in written with a signed of liable party and registered with an competent authority.

Both Thailand and the United Kingdom have the same requirements that must be met in order to form a legally binding lease. Such requirements include the written form, the party's signature, and the registration of the conditional lease. As a consequence, there is no need to amend or add any conditions to the Lease of Immovable Property for Commercial or Industrial Purposes Act of 1999's definition of a lease in order to make it equivalent to the defined lease that can use CRAR.

Since there is no lease under Thai law that has the same characteristics as the equitable lease under English law, the researcher will exclude the equitable lease from the study of the feasibility of implementation in the Lease of Immovable Property for Commercial or Industrial Purposes Act of 1999.

## **3. Leased Property**

CRAR is only capable of recovering rent from commercial properties. A hotel, a retail store, or a warehouse are examples of commercial premises that are used or leased for the purpose of conducting business. The commercial category excludes

mixed-use and residential property. The commercial lease that allows residential usage forbids the use of CRAR, even if it is not actually used as a habitat.

According to the Lease of Immovable Property for Commercial or Industrial Purposes Act of 1999, the leased property must be an immovable property and must be located in a zone designated for industrial or commercial use or an industrial estate zone; thus, the leased property under such Act must be used for business purposes, just like the leased property that can use CRAR under English law.

As a consequence, there is no need to amend or add any conditions to the Lease of Immovable Property for Commercial or Industrial Purposes Act of 1999's qualification of the leased property in order to make it equivalent to the defined leased property that can use CRAR under English law.

#### **4. Recoverable Debt**

The only debt recoverable under CRAR is rent. CRAR may only be used against pure rent, which is the sum due under the lease for the occupancy and use of the premises, plus any applicable VAT and interest. It excludes payments for anything else, including service charges, repairs, maintenance, and insurance, even if they are listed in the lease as rent.

Furthermore, in order for using CRAR, the rent must be due and payable prior to the issuance of the notice of enforcement. Both immediately before the notice of enforcement is delivered and when the goods are first seized, the rent must be able to be calculated with certainty, taking into account any applicable deductions, and the "net unpaid rent" must be greater than the minimum amount of seven days' rent. 'Net unpaid rent' refers to the amount of rent for which CRAR can be used, excluding any interest or VAT included in the rent, as well as any deduction, liquidated damages, or set-off that the tenant might be allowed to claim in a landlord-tenant dispute over.

The Lease of Immovable Property for Commercial or Industrial Purposes Act of 1999, on the other hand, does not identify the sort of debt that can be recovered under the Act. Unlike the recovery of rent arrears in commercial lease agreements through CRAR in the United Kingdom, the Act does not provide a specific debt collection mechanism for leases covered by the 1999 Act. As a result, the landlord can recover any debt arising out of or in connection with a registered commercial lease

under the 1999 Act through a court proceeding in accordance with the Civil and Commercial Code and Civil Procedure Code.

Nevertheless, if the CRAR procedure is implemented in the 1999 Act, the recoverable debt should be limited to just pure rent, as in English law, in order to preserve a balance between the landlord and tenant's interests. Because the landlord can instruct the enforcement agent to take control of the tenant's goods and auction them off to collect rent arrears without a court order, the nature of the CRAR procedure, which requires no court intervention to initiate, has a massive influence on the tenant's interests. As a consequence, it is logical and sensible for the 1999 Act to limit the recoverable debt to just pure rent in order to preserve a balance between the interests of the landlord and the tenant.

#### **4.1.2 An Analysis of the Problem of the Commercial Rent Arrears Recovery Procedure**

In the United Kingdom, the taking control of goods method provided in Schedule 12 of the Tribunals, Courts and Enforcement Act is a specific procedure provided for the enforcement agent acting on behalf of a commercial landlord to use to recover rent arrears. However, there is no particular procedure in Thailand for recovering debt due in a commercial lease agreement; but, Thai law does provide for an execution procedure for enforcing monetary judgment; however, the court judgment is required. As a result, a separate regulation modeled after the taking control of goods procedure should be developed to define the procedure for recovering debts under commercial lease agreements. The major procedures for taking control of goods that should be implemented in Thai law are listed below.

##### **1. Notice of Enforcement**

Regarding the CRAR procedure, after the landlord instructs the Certificated enforcement agent by completing an online Commercial Rent Arrears Recovery instruction form and attaching a copy of the lease, the enforcement agent is obligated under the taking control of goods rules to provide the commercial tenant 7



clear days' notice before taking control their goods to recover rent arrears<sup>157</sup>. A "Notice of Enforcement" is what this is called.

According to Thai law, the notice of enforcement has the same characteristics and functions as the warning notice preceding performance, which must be sent to the debtor before the debt matures. However, under Thai law, if the performance date is set by calendar, the debtor is in default without warning, and no notice is required to be issue before the performance.

Normally, the commercial lease agreement will specify the date on which the tenant is required to pay rent on the same date each month; thus, according to Thai law, a time by calendar is fixed for the performance; thus, if the tenant fails to pay the rent on time, the debtor is in default without warning, and no notice is required to precede the performance.

However, before the CRAR, the distress remedy, which is the ancient model remedy of the CRAR, was seen as a serious interference with human rights because it allowed the landlord to take the tenant's goods on the property and sell them in order to recoup the rent arrears without giving the tenant prior notice and without requiring a court order. As a result, the remedy of distress was repealed by the 2007 Act and replaced by the CRAR, which stipulates that before taking control of a tenant's goods, the tenant must first provide a notice with a seven-day waiting period.

As a consequence, Thai law should include the requirement of a prior enforcement notice, which gives tenants a 7-day waiting period before taking control of their goods, into the debt recovery procedure for registered lease agreements under the 1999 Act, in the same manner that English law provides.

## **2. Method for Taking Control of Goods**

The study indicates that there are several methods, under the English law, for taking control of goods. The first one is to enter into a Controlled Goods Agreement. It is an agreement in which the debtor keeps custody of the goods while admitting that the certificated enforcement agent has control and agrees not to remove or dispose of them, or allow anyone else to do so, until the debt is paid in full. The second one is to secure goods, such as clamped the tenant's vehicle on the highway.

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<sup>157</sup> Tribunal, Court and Enforcement Act 2007, Schedule 12, Paragraph 7, The Taking Control of Goods Regulation 2003, Regulation 6.

The third one is to safeguard things on the leased premises, such as locking up high-value items on a portion of the property. The final one is to remove the goods from the premises and secure them elsewhere.

During the execution stage, the executing officer has the authority to secure sufficient funds for payment by seizing or attaching the judgment debtor's property, both movable and immovable, and also to attach an amount to be paid by a third party to the judgment debtor in order to collect it. To apply this method of debt recovery, however, a court judgment is required.

The English law provides a variety of measures for taking control of tenant's goods in order to make it easier, quicker and more efficient to induce the tenant to pay an outstanding debt without the need to proceed to the next step of auctioning the goods off. The taking control of goods procedure under English law shows implementation of CRAR is available to decrease the problems of the debt recovery in commercial rent. While the problems still exist in Thailand since the 1999 Act does not provide the mechanism the same to the English law.

To offer a rapid and effective mechanism for collecting debt for registered leases under the 1999 Act, a new procedure should be developed and modeled after the aforementioned procedure for taking control of a tenant's goods under English law.

### **3. The Goods that have been subjected to the Procedure for Recovering Debt and the Goods that have been excluded**

Generally, under Thai law, the property that can be seized is confined to the judgment debtor's movable and immovable property; however, the execution officer may seize the properties of the debtor's spouse in some specific circumstances. Thai law also specify several properties that are not liable to execution, such as the instruments for using in the house estimated in all not exceeding fifty thousand baht in value, tools or instrument indispensable for the earning of his living or for his occupation estimated not exceeding one hundred thousand baht in value or the materials, instruments and accessories necessary for doing instead of duty of or helping the organs of the judgment debtor.

The taking control of goods method under English law also specifies the goods that are exempt from control, such as those used as trade tools up to £1,350

in value that are regarded to be instruments needed for the tenant to conduct their trade. Clothing, bedding, furniture, home equipment, and other things that are reasonably essential to fulfill the tenant's and their family's basic domestic needs. Seizing goods whose total value exceeds the outstanding balance plus an amount to cover future charges is also prohibited.

Nevertheless, contrary to Thai law, the taking control of goods procedure limits the goods that can be taken control to just those belong to the tenant and located on the demised premises or on a roadway.

If the taking control of goods procedure, which does not require court intervention, was implemented into the 1999 Act, allowing all immovable and movable properties belonging to the default tenant and debtor's spouse to be subjected to seizure for the recovery of a debt as provided in the Civil Procedure Code, which required a court judgment, the tenant's and interests would be severely harmed, causing an unbalance between the tenant and landlord interest.

As a result, the procedure for recover debt under the 1999 Act should limits the goods that can be taken control to just those belong to the tenant and located on the demised premises or on a roadway as provided under English law. Regarding the property that is excluded from the taking control of goods procedure, the 1999 Act might designate such goods as the same sort of goods that are excluded from execution under the Civil Procedure Code.

#### **4. Auction Process**

The Civil Procedure Code specifies the procedure for auctioning off seized properties as well as the responsibilities of the executing officer as relatively similar as English law; consequently, the 1999 Act may include such a procedure and the responsibilities of the executing officer within the Act's debt recovery procedure. However, Thai law stipulates that the executing officer may sell seized property at auction after a time of at least 60 days has elapsed after the seizure. The taking control of goods procedure, on the other hand, allows the enforcement agent to sell the taken control goods at auction once 14 days have passed from the taken control date.

The English law specifies a minimum period of 7 clear days from removing controlled goods for sale as the minimum period before sale, and the law also specifies that before the sale of goods, the enforcement agent must issue a notice

before sale to the tenant stating the date, time, and place of sale, and the minimum period of such notice is 7 clear days before the sale of the goods. As a result, the overall minimum waiting period before the sale of goods is 14 days.

Nevertheless, if the 1999 Act makes the taking control of goods procedure a recovery debt procedure under the Act, it is seen as already benefiting the landlord because the procedure does not require a court order to proceed, saving the landlord time in recovering the debt when compared to recovering the debt through a court proceeding.

Consequently, the Civil Procedure Code's requirement of a 60-day waiting period before seized property can be sold at auction is already appropriate because it allows the business tenant more time, when compared to English law's waiting period, to acquire funds to pay the outstanding debt before the process of taking control of goods begins.

### **5. The Stages of Taking Control of Goods Procedure**

According to the taking control of goods procedure described in Chapter 3, the procedure may be separated into three stages, which are as follows:

- 1) The Compliance Stage - the enforcement agent is required to serve an enforcement notice to the tenant, which includes a notice of arrears and a seven-day waiting period to settle the arrears.
- 2) Enforcement Stage - if the tenant fails to pay within the seven-day period, the enforcement officer has the authority to seize the tenant's property for the amount owing in rent.
- 3) Disposal Stage - The seized goods are sold at public auction. The proceeds from the sale of any seized goods must be used to pay the amount owed, as well as any fees incurred in enforcing the commercial lease agreement's monetary debt recovery. After repaying the due sum, any remaining proceeds must be returned to the tenant.

Correspondingly, the 1999 Act should divide the stages of the procedural for recovering debt under the Act as provided in the taking control of goods procedure under English law, to make it easier to recognize for all parties involved in this procedure and to make this procedural for recovering debt more systematic.

#### 4.1.3 An Analysis of the Problem of the Certificated Enforcement Agent

Considering the individual who is capable of using the taking control of goods procedure for recovering debt owing under a commercial lease agreement. In the United Kingdom, a person who is competent of using the taking control of goods procedure to recover rent arrears, on behalf of landlord, is known as a certificated enforcement agent or enforcement agent.

The enforcement agents are those who conduct enforcement actions by taking control goods in compliance with Schedule 12 of the Tribunals, Courts and Enforcement Act 2007 and the Taking Control of Goods Regulations 2013. As mentioned earlier, only enforcement agents are allowed under CRAR to take control the tenant's goods in order to recover rent arrears; the landlord is not permitted to take this action.

There are several types of enforcement agents who can perform the CRAR procedure in The United Kingdom: Private (certified) bailiffs, County Court bailiffs, and High Court enforcement officers. In addition to the government's bailiff services, English law allows the private sector to provide bailiff services and comprehensive commercial debt recovery services to businesses throughout the United Kingdom in order to relieve the court's bailiffs of their burden and provide prompt response to the individual.

The commercial landlords commonly utilize private bailiffs to collect rent under a CRAR. They are either self-employed or employed by commercial business. However, unless excluded under section 63(3) of the TCEA 2007, the private enforcement agent must possess a certificate to function as a legal enforcement agent.

An executing officer in Thailand is a person who functions as a United Kingdom enforcement agent. The execution officer is generally assigned by the public sector, namely the legal execution department. The private sector is not allowed to offer executing officer services.

Nevertheless, there is a mechanism through which the private sector may be able to carry out the executing officer's duties as specified in Section 278 paragraph 4 of the Civil Procedure Code. According to Section 278 paragraph 4, the executing officer may appoint other persons to act on their behalf in carrying out the executing officer's duties, as long as the quality principles, method, and conditions set out in the Ministerial Regulations are followed.<sup>158</sup> In addition, the person act for executing officer is included in the definition of the executing officer in Section 1(14) of the Civil Procedure Code.

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<sup>158</sup> The Civil Procedure Code, Section 278 Paragraph 4.



The Ministerial Regulations on the quality principle, method, and condition of the person act for an executing officer detail the permit operation, conditions, and method that the person act for an executing officer must adhere to while performing for the executing officer. Nonetheless, such Ministerial regulation restricted the permissible operations of a person working for an executing officer to just property appraisal, auction sale of property, and preparation of receipts and payments to shareholder accounts.<sup>159</sup>

To enable an appointed person acting for an executing officer to use the adopted procedure of the taking control of goods to recover debt in relation with a registered lease under the 1999 Act, such Ministerial Regulations should be amended to include the use of the taking control of goods procedure as one of the operations that the appointed person is authorized to perform.

Furthermore, such an appointed person should be given the title of certificated enforcement agent or enforcement agent so that the individual can easily recognize the person's responsibility under the Ministerial Regulations, which is to recover debt in relation to a registered commercial lease agreement under the 1999 Act, using the adopted taking control of goods procedure.

Additionally, in order for the business sector to legally provide monetary debt recovery services in commercial lease agreements, the juristic person's qualification under such Ministerial Regulations<sup>160</sup> should be amended to include being a business operator for recovering commercial debt on behalf of landlords and having the goal of doing business as assigned by the executing officer to recover commercial debt.

If the private sector is capable of providing debt collection services in regard to registered leases under the 1999 Act, it will be able to respond quickly to commercial landlords and relieve the legal execution department of its workload.

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<sup>159</sup> The Ministerial Regulations on the Quality Principle, Method, and Condition of the Person act for an Executing Officer, Section 8.

<sup>160</sup> Section 4(2).



## 4.2 An Analysis of the Effectiveness of Commercial Rent Arrears Recovery (CRAR)

### 4.2.1 The Compliance Stage

The enforcement agent is obliged to issue an enforcement notice to the tenant during the compliance stage, which includes a notice of arrears and a seven-day waiting period to settle the arrears. However, there are a few points to consider, including the seven-day waiting period following the issuance of the notice of enforcement.

Regarding the issue of the waiting period following the issuance of an enforcement notice. Even the issuance of such notice binds a debtor's goods, preventing them from being sold or disposed of until the matter is resolved.<sup>161</sup> However, the requirement to deliver prior notice, which gives the tenant seven days before the enforcement agent can take control the tenant's goods, may provide the debtor the opportunity to hide anything worth seizing or taking control, even if they should not.

Some landlords have been particularly concerned about the requirement for notice. Some tenants may be encouraged to remove goods before they are taken. The Tribunal, Court, and Enforcement Act seeks to address this by allowing a landlord to petition for a shorter notice period if it is "probable" that the goods will be removed or disposed of before being seized. However, because the threat is frequently difficult to prove and the cost of applying is high in relation to the debt's worth, this is an unsatisfactory solution.<sup>162</sup>

Nevertheless, according to Paragraph 14(1) of the Schedule 12 Part 2 of the Tribunal, Court and Enforcement Act<sup>163</sup>, if the sole relevant premises are the leased premises, an enforcement agent may enter leased premises without a warrant to search for and seize goods. The Act does not state that the matter must be in the enforcement stage, which occurs when a seven-day waiting period has elapsed following the issuing of an enforcement notice. As a result, nothing prevents an enforcement agent from showing up on the first day to search and list the goods of a default tenant.

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<sup>161</sup> Tribunal, Court and Enforcement Act 2007, Schedule 12, Paragraph 4 and 5.

<sup>162</sup> John Sharples, "Nothin' goin' on but the rent," [www.newlawjournal.co.uk/content/nothin-goin-rent](http://www.newlawjournal.co.uk/content/nothin-goin-rent), (accessed June 25, 2021).

<sup>163</sup> Tribunal, Court and Enforcement Act 2007, Schedule 12, Paragraph 14(1).

On this visit, the enforcement agent can serve the notice of enforcement by hand, shortening the time it takes to take control down to seven days, as well as search and list the goods. The enforcement agent can serve the notice of enforcement by hand on this visit, cutting the time it takes to take control down to seven days, while also search and listing the goods in such day of visit. This has the obvious advantage of being able to collect information of the goods and having a massive influence on the default tenant than a letter or email.

Based on the findings, as illustrated in the case study in London, some tenants may prefer to settle the debt rather than incur additional enforcement costs. According to London case study<sup>164</sup>, after the enforcement agent delivered a notice of enforcement under the CRAR, requesting rent payment. To avoid further enforcement agent costs, the tenant agreed to pay in full. It had cost him £75 to have such an agent serve the enforcement notice. The tenant's actions indicate that he did not want to deal with the enforcement agent and, more importantly, did not want to pay the enforcement costs that would have been the next step in the procedure.

Moreover, as stated by a UK-based debt recovery firm that provides various debt recovery services, before the business tenant's goods are taken away, the great majority of business tenants who are confronted with CRAR either pay in full or agree to an installment plan with their landlord. For instance, in the case study hull, East Yorkshshire,<sup>165</sup> the tenant of a small retail business in Hull, East Yorkshire, is in arrears on his rent and has repeatedly broken payment agreements. As a result, the landlord chose to pursue CRAR (Commercial Rent Arrears Recovery). The tenant called after receiving the Notice of Enforcement and sought for a payment plan since he couldn't pay in full. Following a discussion with the landlord, a payment plan was devised utilizing a Controlled Goods Agreement, in which the debt was secured upon his goods. The enforcement agent was able to obtain a large down payment and put the tenant on a weekly payment plan to settle the arrears using this Taking Control of Goods option.

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<sup>164</sup> Quality Bailiffs, "Commercial Rent Arrears Recovery London," [www.qualitybailiffs.co.uk/news/crar/london.html](http://www.qualitybailiffs.co.uk/news/crar/london.html), (accessed June 24, 2021).

<sup>165</sup> Quality Bailiffs, "Commercial Rent Arrears Recovery Hull," [www.qualitybailiffs.co.uk/news/crar/hull.html](http://www.qualitybailiffs.co.uk/news/crar/hull.html), (accessed June 24, 2021).

#### 4.2.2 Enforcement Stage

The enforcement stage begins when the tenant fails to pay within the seven-day period; the enforcement agent has the right to take control the tenant's property for the amount owed in rent.

Because the CRAR procedure provides a variety of methods for taking control of goods, if a discussion about the payment of the rent cannot be reached or there is nothing of value in the leased premise to be seized, securing the tenant's goods on the highway, such as a vehicle, is another possible option available to the enforcement agent; thus, it may make it easier to take control the goods. The flexibility and diversity of the taking control of goods method, as demonstrated in the following case study, may not only make it easier to take control of the goods, but it may also be feasible to persuade the defaulting tenant to make the payment.

According to the CRAR Sunderland Takeaway case<sup>166</sup>, the tenant, who runs a takeaway business, had not paid rent to the landlord for several months and owed the landlord about £10,000. As a result, the landlord sent the enforcement agent for Commercial Rent Arrears Recovery (CRAR). The property's tenant had ignored the enforcement agents' earlier letters outlining the issue and had made no attempt to pay within the time frame given so the enforcement agents to visit the premises. They had a discussion about paying the rent but were unable to reach an agreement, with the tenant stating he couldn't afford any income.

As a result, the agent had no choice but to take goods to cover the debt. However, there is little of value in the leased premise. However, the agent saw a BMW parked outside the store and proceeded to investigate the ownership of the car on his own initiative. The tenant was the owner of the car. He quickly seized the car, and when he returned inside and informed the tenant what he'd done, the tenant was instantly convinced to pay the whole amount of unpaid rent. As seen by the facts given in this instance, the flexibility and simplicity of the taking control of goods method make it easier to recover rent arrears using CRAR.

Moreover, as stated by a UK-based debt recovery firm that provides various debt recovery services, before the business tenant's goods are taken away, the great majority of business tenants who are confronted with CRAR either pay in full or agree

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<sup>166</sup> Quality Bailiffs, "CRAR Sunderland Takeaway," [www.qualitybailiffs.co.uk/news/crar/sunderland-takeaway.html](http://www.qualitybailiffs.co.uk/news/crar/sunderland-takeaway.html), (accessed June 24, 2021).

to an installment plan with their landlord. For instance, in the case study hull, East Yorkshire,<sup>167</sup> the tenant of a small retail business in Hull, East Yorkshire, is in arrears on his rent and has repeatedly broken payment agreements. As a result, the landlord chose to pursue CRAR (Commercial Rent Arrears Recovery).

The tenant called after receiving the Notice of Enforcement and sought for a payment plan since he couldn't pay in full. Following a discussion with the landlord, a payment plan was devised utilizing a Controlled Goods Agreement, in which the debt was secured upon his goods. The enforcement agent was able to obtain a large down payment and put the tenant on a weekly payment plan to settle the arrears using this Taking Control of Goods option.

According to a UK-based legal firm that provides legal services, many business tenants is concerned about the negative impact of an enforcement agent showing up on their business premise, and want to keep their employees and consumers from realizing that they are behind on their rent. Therefore, business tenants are generally motivated to pay their rent arrears by the threat of having their property taken away and auctioned, making this remedy particularly effective for the landlord to recover rental arrears from business tenants.<sup>168</sup>

Additionally, as reported by the Sheriff's Office, a debt collecting firm in the United Kingdom, the simple presence of the enforcement agent, as in the great majority of enforcement cases, is enough to induce the tenant to settle all arrears. Goods are only seized on very rare occasions.<sup>169</sup>

#### 4.2.3 Disposal Stage

When taken control goods are sold at public auction, this is referred to as the disposal stage. Consider the situation when the auction proceeds are less than the amount owing. According to the Tribunal, Court and Enforcement Act and the Taking

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<sup>167</sup> Quality Bailiffs, "Commercial Rent Arrears Recovery Hull," [www.qualitybailiffs.co.uk/news/crar/hull.html](http://www.qualitybailiffs.co.uk/news/crar/hull.html), (accessed June 24, 2021).

<sup>168</sup> Gail Morris, "How the Commercial Rent Arrears Recovery scheme (CRAR) can help you recover rent arrears," [www.pdt.co.uk](http://www.pdt.co.uk), (accessed June 24, 2021).

<sup>169</sup> The Sheriffs Office, "Recovering commercial rent arrears," [www.thesheriffsoffice.com/articles/recovering\\_commercial\\_rent\\_arrears](http://www.thesheriffsoffice.com/articles/recovering_commercial_rent_arrears), (accessed June 24, 2021).

Control of Goods Act<sup>170</sup>, if controlled goods are sold, the proceeds of the sale of such goods must be allocated in a certain manner. Co-owner, then Auctioneer expenses will be deducted first from the sale proceeds, followed by the £75 Compliance fee, and the remaining proceeds will be allocated to pay an outstanding amount to the landlord. Consequently, if the proceeds of sale do not cover the debt, the landlord may be expected to bear an outstanding balance, and the landlord will be unable to forfeit or terminate the lease agreement until the next default.

Considering the issue of the forfeiture right's waiver. Even exercising CRAR, however, is a waiver of the right to immediately end the lease agreement since an enforcement agent cannot act on CRAR and Forfeiture of the same debt at the same time. Optimally, the current tenant would be allowed to stay in the leased space, rescuing the landlord the trouble of having an empty space and having to find a new tenant, and the tenant would be able to continue operating his business in the leased space, allowing him to recoup an outstanding balance and pay monthly rent.

Additionally, if the tenant fails to pay rent in the next quarter after utilizing CRAR, the landlord still has the alternative of using CRAR to collect an outstanding balance in that quarter or forfeiting the lease agreement. Under English law, however, a commercial landlord does not have an automatic right to forfeit a lease before the stipulated termination date without resorting to the courts, and can only do so if the lease includes a relevant Clause<sup>171</sup>. As a consequence, as compared to forfeiting the lease agreement, utilizing CRAR to collect an overdue debt may be a preferable option.

### 4.3 Conclusion

Regarding the problem of Commercial Rent Arrears Recovery implementation in Thai legal system, based on the above-mentioned analysis, Commercial Rent Arrears Recovery procedure is possible to implement in Thai legal system. The fundamental requirements and the procedure that must be satisfied before exercising CRAR can be implemented.

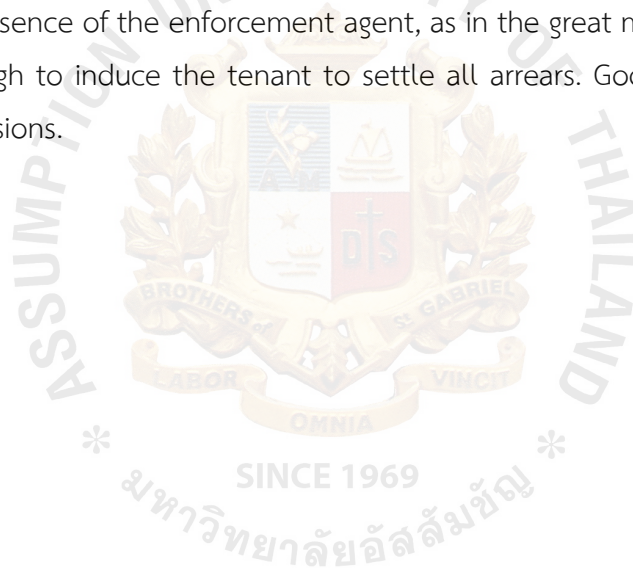
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<sup>170</sup> Tribunal, Court and Enforcement Act 2007, Schedule 12, Paragraph 50, SI 2014/1, Regulation 13.

<sup>171</sup> Revenue Service, "The Pro and Con of CRAR and Forfeiture," [www.revenue.servicesltd.com](http://www.revenue.servicesltd.com), (accessed June 25, 2021).

Moreover, according to the case study and findings, it is possible to conclude that if the business landlord is certain that the business tenant has sufficient valuable goods to cover the rent arrears, Commercial Rent Arrears Recovery is an efficient recovery approach. Because a court order is not required to initiate the CRAR procedure, it is relatively quick and convenient. Furthermore, because the tenant covers the cost of enforcement and is reimbursed as part of the enforcement recovery, it might also be considered a low-cost option to recover rental arrears for the landlord.

Additionally, as reported by the Sheriff's Office and a UK-based legal firm that provides legal services, many business tenants is concerned about the negative impact of an enforcement agent showing up on their business premise, and want to keep their employees and consumers from realizing that they are behind on their rent. Therefore, the simple presence of the enforcement agent, as in the great majority of enforcement cases, is enough to induce the tenant to settle all arrears. Goods are only seized on very rare occasions.





## Chapter 5

### Conclusion and Recommendations

#### 5.1 Conclusion

The Commercial Rent Arrears Recovery (CRAR) is an alternative mechanism, in addition to court-based remedies, designed to recover rent arrears for commercial landlords in the United Kingdom. It was created in response to complaints of the courts' expense, time, ineffectiveness, and complexity, as well as to avoid a slowing of the property market and a shortage of business premises as a result of the abolition of the Distress remedy, which is the landlord's preferred method of recovering rent arrears due to its speed and lack of a court order requirement.

The CRAR allows the landlord to instruct a certificated enforcement agent to use The Taking Control of Goods procedure to seize the tenant's goods and sell them at public auction to recover outstanding debts without requiring the court order. The English law provides a variety of measures for taking control of tenant's goods in order to make it easier, quicker and more efficient to induce the tenant to pay an outstanding debt without the need to proceed to the next step of auctioning the goods off. By entering into a controlled goods agreement, for example, the debtor retains possession of the goods while acknowledging that the enforcement agent has control and agrees not to remove or dispose of them, or allow anyone else to do so, until the debt is paid.

Moreover, according to the case study and findings, it is possible to conclude that if the business landlord is certain that the business tenant has sufficient valuable goods to cover the rent arrears, CRAR is an efficient recovery approach. Because a court order is not required to initiate the CRAR; thus, it is relatively quick and convenient. Furthermore, because the tenant covers the cost of enforcement and is reimbursed as part of the enforcement recovery, it might also be considered a low-cost option to recover rental arrears for the landlord.

Additionally, as reported by the Sheriff's Office and a UK-based legal firm that provides legal services, many business tenants is concerned about the negative impact of an enforcement agent showing up on their business premise, and want to keep their employees and consumers from realizing that they are behind on their rent. Therefore, the simple presence of the enforcement agent, as in the great majority of enforcement

cases, is enough to induce the tenant to settle all arrears. Goods are only seized on very rare occasions.

In Thailand, due to the lack of particular debt collection mechanism for commercial leases under the Lease of Immovable Property for Commercial or Industrial Purpose Act of 1999, the only mechanism for a commercial landlord to recover debt owed under a commercial lease agreement is to take legal action. However, the landlord's satisfaction to recover debt in a timely manner may not be satisfied owing to the slowness of the judicial process, which is caused by an overburdened court system.

As a result, recouping debt through the court system is insufficient and ineffectual in settling debt in timely manner, giving rise in a problem with debt recovery in commercial lease agreements under the 1999 Act, contributing to the failure to encourage local developers to invest in real estate in order to provide business premises for foreign investors and participate in commercial lease agreements under the Act of 1999.

A lack of local real estate investment to supply business premises for foreign investors would result in a slowing of the property market and a shortage of business premises. If there are fewer eligible leased premises for foreign investment, there will be a demand-supply imbalance for leased premises, resulting in a rent increase. The rise in the rent of eligible leased premises for foreign investment will undoubtedly have a negative impact on foreign investors' decision to invest in Thailand, perhaps causing a slowdown in the economy with severe economic and employment consequences.

Consequently, in order to tackle the problems of the lack of a particular debt collection mechanism for commercial leases under the Act of 1999, reduce the court's workload by offering alternative measures that can be used to persuade a tenant to settle an outstanding debt without having to go through further court-related procedures, as well as to encourage more local developers to invest in real estate and participate in commercial lease agreements under the Act of 1999, thereby encouraging foreign investment and strengthening the Thai economy, the Act of 1999 should be revised by including the concept of Commercial Rent Arrears Recovery (CRAR) as a debt collection mechanism for registered commercial lease agreements registered under the Act.

## 5.2 Recommendations

From the conclusion, Thailand should adopt Commercial Rent Arrears Recovery (CRAR) into the Lease of Immovable Property for Commercial or Industrial Purposes Act of 1999, in a timely manner as the following recommendations:

### 5.2.1 The Fundamental Requirement of Commercial Rent Arrears Recovery (CRAR)

The fundamental requirements for using the debt recovery procedure under the Lease of Immovable Property for Commercial or Industrial Purposes Act of 1999 should be modeled after the CRAR fundamental requirements specified in the Tribunal, Court, and Enforcement Act. Additional provisions of such a fundamental requirement are as follows:

1. The provision allows a commercial landlord to use debt recovery procedures provided by the Act to recover a debt owing under a registered commercial lease.
2. The provision additionally defines a landlord as one who grants a lease or tenancy to another party in exchange for a rent.
3. The provision define a term of lease as a lease of property for the commercial or industrial purposes. A legitimate lease under the Act should be one that is drafted and signed by both parties or the responsible party.
4. The provision defines leased property as a property or premises that is leased only for commercial or industrial purposes. A lease that is leased as a residence or inhabited as a residence is not defined as a qualifying leased property under the Act.
5. The provision defines a recoverable debt under the Act as a pure rent, which is an amount due under a lease for possession and use of the leased property. It should not include sums for rates, council tax, services, repairs, maintenance, insurance, or any other ancillary expenses, regardless of whether they are referred to as rent in the lease. The recoverable debts are those that become due and payable prior to the issuing of a notice of enforcement, must be certain or capable of being calculated with certainty, and are at least 7 days past due.

### 5.2.2 Taking Control of Goods Procedure

The researcher suggests developing a distinct procedure, called as a taking control of goods procedure, to be utilized to recover debt owing under a registered lease under the 1999 Act. The taking control of goods should be modeled after the taking control of goods procedure under English law, which is provided in Schedule 12 of the Tribunal, Court, and Enforcement Act 2007 (TCEA 2007).

The main procedure for enforcing the procedure should be divided into three stages. The following are the three stages of the taking control of goods procedure:

1. **The Compliance Stage** - the enforcement agent is required to serve an enforcement notice to the tenant, which includes a notice of arrears and a seven-day waiting period to settle the arrears.
2. **Enforcement Stage** - if the tenant fails to pay within the seven-day period, the enforcement officer has the authority to seize the tenant's property for the amount owing in rent.
3. **Disposal Stage** - The seized goods are sold at public auction. The proceeds from the sale of any seized goods must be used to pay the amount owed, as well as any fees incurred in enforcing the commercial lease agreement's monetary debt recovery. After repaying the due sum, any remaining proceeds must be returned to the tenant.

Moreover, the following four methods for taking control of goods should be included in the taking control of goods procedure under the 1999 Act:

1. By a controlled goods agreement, in which the debtor keeps possession of the goods while admitting that the enforcement agent has control and undertakes not to remove or dispose of them, or allow anyone else to do so, until the debt is paid.
2. By securing goods on the premises
3. By securing goods, such as vehicle, on a public highway
4. By removal goods from the premises

The 1999 Act should clarify explicitly that only an enforcement agent acting on behalf of the commercial landlord is authorized to use the taking control of goods procedure under the Act to recover debt due under the registered commercial lease agreement. The taking control of goods procedure should also determine the applicability of goods that may be seized or taken control, limiting it to only the goods

of the tenant located on the leased premises or on highway. The commodities necessary by the debtor and their household to satisfy their essential home necessities, such as clothing, stoves, microwaves, refrigerators, washing machines, dining tables and bed should be exempt from seizure or taking control under the procedure.

### 5.2.3 Certificated Enforcement Agent

Apart from the executing officer assigned by the public sector, a private sector should be able to perform the public sector's executing officer tasks to relieve the legal execution department of their load and to provide prompt response to the commercial landlord.

There is a mechanism through which the private sector may be able to carry out the executing officer's duties as specified in Section 278 paragraph 4 of the Civil Procedure Code. According to Section 278 paragraph 4, the executing officer may appoint other persons to act on their behalf in carrying out the executing officer's duties, as long as the quality principles, method, and condition set out in the Ministerial Regulations are followed.<sup>172</sup>

The Ministerial Regulations on the quality principle, method, and condition of the person act for an executing officer detail the permit operation, conditions, and method that the person act for an executing officer must adhere to while performing for the executing officer. Nonetheless, such Ministerial regulation restricted the permissible operations of a person working for an executing officer to just property appraisal, auction sale of property, and preparation of receipts and payments to shareholder accounts.<sup>173</sup>

To enable an appointed person acting for an executing officer to use the adopted procedure of the taking control of goods to recover debt in relation with a registered lease under the 1999 Act, such Ministerial Regulations should be amended to include the use of the taking control of goods procedure as one of the operations that the appointed person is authorized to perform.

Furthermore, such an appointed person should be given the title of certificated enforcement agent or enforcement agent so that the individual can easily

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<sup>172</sup> The Civil Procedure Code, Section 278 paragraph 4.

<sup>173</sup> The Ministerial Regulations on the Quality Principle, Method, and Condition of the Person act for an Executing Officer, Section 8.

recognize the person's responsibility under the Ministerial Regulations, which is to recover debt in relation to a registered commercial lease agreement under the 1999 Act, using the adopted taking control of goods procedure.

Additionally, in order for the business sector to legally provide monetary debt recovery services in commercial lease agreements, the juristic person's qualification under such Ministerial Regulations<sup>174</sup> should be amended to include being a business operator for recovering commercial debt on behalf of landlords and having the goal of doing business as assigned by the executing officer to recover commercial debt.



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<sup>174</sup> Section 4(2).



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